SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 478

EMMETT HORTON, *Petitioner,*

vs.

LIBERTY MUTUAL INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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1 IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

LIBERTY MUTUAL INSURANCE COMPANY, *Plaintiff*,

versus

EMMETT HORTON, *Defendant*.

Plaintiff's Original Complaint—Filed Apr. 30, 1959

To the Honorable Judge of said Court:

Comes Now Liberty Mutual Insurance Company, plaintiff in the above entitled and numbered cause, and files this action against Emmett Horton, a resident of Texas, and for cause of action would respectfully show unto the Court the following:

2 1.

Plaintiff Liberty Mutual Insurance Company is a private corporation duly incorporated under and by virtue of the laws of the State of Massachusetts and is domiciled and has its place of residence and principal place of business in said state and its home office and principal place of business is in Boston, Massachusetts and it has a valid and subsisting permit to do business in Texas and at all times material hereto, plaintiff was duly authorized to conduct the business of writing insurance in the State of Texas. The defendant Emmett Horton is a resident citizen of Newton County, Texas, and can be served with process at Newton, Texas, Route 2, Box 162.

2.

Plaintiff, Liberty Mutual Insurance Company complains of said defendant and says that the defendant has claimed and now claims and alleges that on or about October 8, 1957, that the defendant sustained an accidental injury in the course of and scope of his employment for American Bridge Division, United States Steel Corporation in Orange, Orange County, Texas, resulting in total and permanent disability, and defendant further claimed that he at that time, was earning in excess of Ninety Dollars ($90) per week and that his wage rate would entitle him to workmen's compensation benefits and payments at the rate of Thirty-five Dollars ($35) per week for Four Hundred

One weeks (401), and that as a result of said alleged accidental injury resulting in such alleged disability that defendant claims and will claim the sum of Fourteen Thousand Thirty-five Dollars ($14,035.00) which sum is in excess of Ten Thousand Dollars ($10,000.00) exclusive of interest and costs.

3.

That heretofore to-wit, on the 30th day of April, 1959 the Industrial Accident Board of the State of Texas, made and entered its final ruling, order and award in favor of said defendant and against this plaintiff in the matter of that certain claim of the defendant against this plaintiff which was numbered before said Board S-46626 and was styled Emmett Horton vs. American Bridge Division, United States Steel Corporation, Employer and Liberty Mutual Insurance Company, Insurer, on the docket of said Board; that by the terms of said ruling, order and award, it was ordered and decreed that on October 8, 1957 that the employer above named was a subscriber to the Employer's Liability Act of Texas, and that such workmen's compensation or employer's insurance was carried by Liberty Mutual Insurance Company; that on such date the employer had within its employ more than three (3) employees, including Emmett Horton, whose average weekly wage produced a compensation rate of Thirty-five Dollars ($35) per week under said Act, that on October 8, 1957, said Emmett Horton suffered accidental injuries in the course and scope of his employment resulting in disability and in payment accrued in the amount of Thirty (30) weeks at the rate of Thirty-Five Dollars ($35) per week or the sum of One Thousand Fifty Dollars ($1050), that within twenty (20) days after the rendition and entry of said final ruling, order and award of the Industrial Accident Board of the State of Texas, plaintiff herein, being an interested party in and to the award, gave to and filed with the Industrial Accident Board of the State of Texas, notice in writing that it, the Liberty Mutual Insurance Company, plaintiff herein was dissatisfied with and would not abide by the award so made, and further, said notice was so served and filed, and stated that plaintiff herein would file a suit in a Court of competent jurisdiction

within the proper and legal time for the purpose of setting aside and vacating said award, and now this plaintiff within 20 days from the filing with the said Industrial Accident Board of the State of Texas, with said notice, files this its suit in this Court to set aside said award, said original notice of dissatisfaction having been filed on or about April 30, 1959.

4.

The amount in controversy as claimed by defendant and which defendant claimed and claims before the Industrial Accident Board is in excess of the sum of Ten Thousand Dollars ($10,000) exclusive of interest and costs, said defendant before the Industrial Accident Board claiming to have been totally and permanently injured in said above described accident in the course and scope of his employment, which if true, would be a sum equal to Fourteen Thousand Thirty-five Dollars ($14,035.00).

5.

As shown in the preceding paragraph the amount in controversy was and is in excess of Ten Thousand Dollars ($10,000) exclusive of interest and costs, said injury is alleged to have occurred in Orange County, Texas, which is within the district of the United States District Court, in and for the Eastern District of Texas, and is within the Beaumont Division thereof, and due to the complete diversity of all the adverse parties in interest, this Court has jurisdiction and venue to entertain this suit and vacate and set aside the said award and order of the Industrial Accident Board of the State of Texas.

6.

Plaintiff would further show that said order, and award of the Industrial Accident Board of the State of Texas, above described, made and entered on April 30, 1959, in this claim and the claim itself of the defendant herein is wholly unsupported by evidence or law and should be in all things, vacated, set aside and held for naught.

7.

Plaintiff would further show unto the Court that the said award and order of the Industrial Accident Board of the State of Texas, above described, made, rendered and entered on April 30, 1959 and the claim of the defendant of total and permanent disability is wholly without evidence to support it in law for the reason that, and this plaintiff alleges that any disability which the defendant has is due solely and alone to other diseases, conditions and injuries, or a combination thereof, and in nowise contributed to or caused by the alleged injury in
6 the course and scope of his employment for American Bridge Division, United States Steel Corporation.

8.

That the plaintiff herein Liberty Mutual Insurance Company, was and is the workmen's compensation insurance carrier for United States Steel Corporation, American Bridge Division on the date of the accident claimed by the defendant, to-wit October 8, 1957.

Wherefore, premises considered, plaintiff prays that defendant be cited to appear and answer this complaint and that upon final hearing hereof said award be in all things vacated, set aside, voided and declared to be of no further force and effect, plaintiff further prays that defendant herein take nothing of and from this plaintiff and that plaintiff recover its costs and be given such other and further relief as it may be justly entitled to receive.

Respectfully submitted,

HOWELL COBB,
Howell Cobb,
Attorney for Plaintiff.

First Federal Savings Building,
Beaumont, Texas.

A trial by jury is respectfully requested upon all issues of fact.

HOWELL COBB,
Howell Cobb.

7 IN UNITED STATES DISTRICT COURT

Motion to Dismiss—Filed May 25, 1959

To the Honorable Judge of said Court:

Comes now Emmett Horton, defendant herein, and files this his motion to dismiss and as grounds therefor would show and moves the Court as follows:

I.

To dismiss the action on the ground that the Court lacks jurisdiction because the amount in controversy is less than $10,000 exclusive of interest and costs which is conclusively shown by the award of the Industrial Accident Board (exhibit B) in that their award was $1,050.00 from which the plaintiff herein has appealed; that the amount of disability claimed by the defendant, as a result of his injury of October 8, 1957, prior to or after the filing of this suit would not be binding on defendant and would certainly not be the controlling amount in determining the amount in controversy for purposes of jurisdiction in this action, but to the contrary this suit is at the present exclusively a suit by plaintiff herein to set aside an award of the Industrial Accident Board, which award is $1,050.00 and the only amount in controversy at the present time, and which is considerably less than the $10,000.00 exclusive of interest and costs necessary to give this Honorable Court jurisdiction which it does not have since the amount in controversy is insufficient to give such jurisdiction.

8 II.

To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds that by the Federal Rules of Civil Procedure your defendant is given a period of 20 days after service to file a responsive pleading to plaintiff's original complaint but that by Exhibit A hereto annexed it clearly appears that the date of the service of summons which was served upon the defendant does not appear on said summons so that the defendant nor his attorney are apprised thereby of the exact date of the service of said summons and the defendant is therefore not informed and cannot calculate or deduct from the summons

the exact date in which to serve upon the plaintiff a reply to plaintiff's Original Complaint in order that a judgment by default not be taken.

III.

To dismiss the action on the ground that this Court has no jurisdiction over the subject matter in that this suit is one to set aside an award of the Industrial Accident Board of Texas; that the Workmen's Compensation Insurance Laws of the State of Texas therefore apply hereto; that Article 8207, Section 5, revised Civil Statutes of Texas, 1925 is applicable herein and the pertinent and relevant part reads as follows:

"Any interested party who is not willing and does not consent to abide by the final ruling and decision of said Board shall, within twenty (20) days after the rendition of said final ruling and decision by said Board, file with said Board notice that he will not abide by said final ruling and decision. And he shall within twenty (20) days after giving such notice bring suit in the County where the injury occurred to set aside said final ruling and decision, and said Board shall proceed no further toward the adjustment of such claim, other than hereinafter provided."

That the award of the Industrial Accident Board in this case was dated April 30, 1959 (Exhibit B) and a true copy of the summons clearly shows this suit was filed the same day April 30, 1959. That the filing of the suit was prior to the giving notice of dissatisfaction of the Board's award and therefore this Court has no jurisdiction over this action since plaintiff has not complied with the Laws of Texas. In the alternative if it should appear that plaintiff did give their notice of dissatisfaction with the Board's award before filing suit in this Honorable Court it is nevertheless shown by the exhibits attached hereto that the defendant in filing suit to set aside an award of the Industrial Accident Board of Texas on the same day the award was given is in conflict with the above set out statute and that therefore the defendant's action must be dismissed since such non compliance with the Workmen's Compensation Insurance Laws of Texas results in this

Court not having jurisdiction over the subject matter of this lawsuit.

Wherefore, defendant Emmett Horton respectfully prays that the complaint of the plaintiffs herein be in all things dismissed for the reasons above alleged.

JOE H. TONAHILL,

By FLOYD W. ADDINGTON,
Floyd W. Addington,

Attorneys for Defendant.

Jasper, Texas.

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10 A copy of this motion was on this ... day of May, 1959, duly deposited in the United States mail, properly stamped and addressed to Mr. Howell Cobb of Orgain, Bell & Tucker, Attorney at Law, First Federal Savings Building, Beaumont, Texas, the attorneys for the plaintiffs herein.

FLOYD W. ADDINGTON,
Floyd W. Addington.

Exhibit "A" to Motion to Dismiss

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION

LIBERTY MUTUAL INSURANCE COMPANY, *Plaintiff*,

v.

EMMETT HORTON, *Defendant*.

Summons in a Civil Action.

Civil Action File No. 4162

To the above named Defendant: Emmett Horton, Route 2, Box 162, Newton, Texas.

You are hereby summoned and required to serve upon Mr. Howell Cobb of Orgain, Bell & Tucker, plaintiff's attorney, whose address is First Federal Savings Build-

ing, Beaumont, Texas, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JAMES R. COONEY,
Clerk of Court,

(S.) HELEN ROSE BARRY,
Deputy Clerk.

(Seal of Court)

Date: April 30, 1959.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

P. Exh. B-7 to Dep. of [illegible]

Exhibit "B" to Motion to Dismiss

Exhibit "B" to Motion to Dismiss

12

[redacted]
Route 2
Newton, Texas

073-61747 R

INDUSTRIAL ACCIDENT BOARD
WALTON BUILDING
AUSTIN 14, TEXAS

Mr. Joe H. Trenchill, Attorney--15
Trenchill Building
Jasper, Texas

United States Steel Corporation,
American Bridge Division

Liberty Mutual Insurance Company
1250 Travis Street
Houston 2, Texas

Engerrand & Feiner, Austin, Texas Mr. John W. Laird, Attorney

10-8-57

On date of hearing after due notice to all parties, came the above numbered and described claim for compensation to be considered by the Industrial Accident Board, and the Board finds and orders: (Only Findings Orders, etc. X'd in appropriate spaces below apply.)

1. X Finds that on date of injury the employee sustained injury in the course of employment of the employer named above who was a subscriber under the Workmen's Compensation Act, insured with the insurance carrier named above.

2. X Finds that employee's average weekly wage before the injury was X in excess of $58.33

3. X Finds that the compensation rate is $ 38.89

4. X Orders: The carrier to pay employee $ 38.89 per week for 10 consecutive weeks for total disability beginning on 10-9-57 for injuries received

5. Orders: The carrier to pay employee $ _____ per week for _____ consecutive weeks (following payment of compensation, if any, due for total disability) for _____ % permanent loss of

6. X Compensation ordered paid under this award which has accrued from date disability began to date this award is entered, less payments already made, shall be paid in a lump sum.

7. Special Findings and Orders:

X That payments of compensation have matured in the sum of $1,050.00.

That named employee has no loss in wage earning capacity.

13 IN UNITED STATES DISTRICT COURT

Motion to Strike, and Original Answer of Defendant and Defendant's Cross-Complaint—Filed May 25, 1959

Comes now Emmett Horton, defendant herein, and subject to but not waiving his Motion to Dismiss Plaintiff's Original Complaint which is already on file herein, files this his motion to strike and as grounds therefor would show:

1.

Defendant says that the allegations contained in Paragraph 7 of Plaintiff's Original Complaint, to-wit:

"7.

"Plaintiff would further show unto the Court that the said award and order of the Industrial Accident Board of the State of Texas, above described, made, rendered and entered on April 30, 1959 and the claim of the defendant of total and permanent disability is wholly without evidence to support it in law for the reason that, and this plaintiff alleges that any disability which the defendant has is due solely and alone to other diseases, conditions and injuries, or a combination thereof, and in nowise contributed to or caused by the alleged injury in the course and scope of his employment for American Bridge Division, United States Steel Corporation."

14 should be stricken because the same is wholly immaterial, redundant and irrelevant to any of the issues in this cause and such allegation forms no grounds or basis for any cause of action or a part thereof in favor of the plaintiff for the reason that the issue of whether or not any disability which the defendant has is due solely and alone to other diseases, conditions and injuries, or a combination thereof, and in nowise contributed to or caused by the alleged injury in course and scope of his employment for American Bridge Division, United States Steel Corporation, has already been decided in the case of Emmett Horton v. Liberty Mutual Insurance Company, No. 11,986 in the District Court of Orange County, Texas; that the above mentioned case in Orange County involved exactly the same parties as this cause, i.e. Emmett Horton and

Liberty Mutual Insurance Company; that insofar as the issue of the herein defendants disability being due solely to other diseases, conditions and injuries, etc. such issue was answered in favor of defendant in the above referred to Orange County case by the submission of the following special issue and the answer of the jury therein:

"Special Issue No. 5.

"Do you find from a preponderance of the evidence that the plaintiff, Emmett Horton's incapacity, if any, is not due solely to diseases, natural causes, and prior injuries, if any, wholly disassociated from his injury of October 8, 1957, if any?

"Answer: 'It is not due solely to diseases, etc.' or 'It is due solely to diseases, etc.'

"Answer: 'It is not due solely to diseases, etc.'"

That said issue involved the same subject matter as is present in this cause and the presence of this issue in this cause would be immaterial, redundant and irrelevant since said issue has already been settled by judgment and any submission of this issue would thus be barred by res judicata.

Wherefore, the defendant prays that his foregoing motion to strike be in all things granted.

II.

Original Answer.

Subject to Defendant's Motion to Dismiss and Motion to Strike, defendant files this his answer as follows:

First Defense.

1.

The Defendant admits the allegations contained in Paragraph 1 of Plaintiff's Original Complaint.

2.

Defendant admits the allegations contained in Paragraph 2 of Plaintiff's Original Complaint.

3.

Defendant is without sufficient information to either admit or deny the allegations contained in Paragraph

3 of Plaintiff's Original Complaint insofar as the facts alleged therein happening prior to (or "heretofore to-wit") the filing of the plaintiff's suit herein. The defendant does admit the remaining allegations contained in said Paragraph.

4.

Subject to Defendant's Motion to Dismiss on file herein defendant admits the allegations contained in Paragraph 4 of Plaintiff's Original Complaint.

5.

Subject to Defendant's Motion to Dismiss on file herein defendant admits the allegations contained in Paragraph 5 of Plaintiff's Original Complaint.

6.

Defendant denies the allegations contained in Paragraph 6 of Plaintiff's Original Complaint.

7.

Defendant denies the allegations contained in Paragraph 7 of Plaintiff's Original Complaint.

8.

Defendant admits the allegations contained in Paragraph 8 of Plaintiff's Original Complaint.

9.

Defendant denies any allegations contained in the prayer of the complaint herein.

Wherefore, premises considered, defendant prays that plaintiff take nothing by reason of this suit and that this defendant recover all costs of Court incurred herein and for other and further relief, general and special, as defendant may show himself justly entitled to receive.

JOE H. TONAHILL,

By FLOYD W. ADDINGTON,
Floyd W. Addington,
Attorney for Defendant.

Jasper, Texas.

Defendant's Cross-Complaint

Comes now Emmett Horton, hereinafter called cross-plaintiff, and files this his cross-complaint, complaining of Liberty Mutual Insurance Company, hereinafter called cross-defendant, and for cause of action represents unto the Court as follows:

1.

That on or about the 30th day of April, 1959, the Industrial Accident Board rendered an award in the claim of Emmett Horton v. United States Steel Corporation, American Bridge Division, Employer, and Liberty Mutual Insurance Company, Insurance Carrier, Board Number S-46626; that subsequent thereto on May 4, 1959 your cross-plaintiff did on or about May 7, 1959 file suit in the District Court of Orange County to set said award aside; that prior to cross-plaintiff's suit in Orange County the cross-defendant herein filed suit in this Honorable Court to set aside the same award of said Board; that cross-defendant then did and prior to this cross-action file a motion to
18 dismiss the said suit of cross-defendant; therefore cross-plaintiff files this his cross-action subject to his motion to dismiss and without waiving same.

2.

That your cross-plaintiff is a resident citizen of Newton County, Texas; that your cross-defendant is a private corporation incorporated under the laws of the state of Massachusetts and operating in Texas pursuant to a permit from the secretary of State of the State of Texas, with its agent for service being the Commissioner of Insurance, Capitol Building, Austin, Texas, where the cross-defendant may be served with process.

3.

That all conditions precedent to the acquisition of jurisdiction by this Honorable Court have been complied with by your cross-plaintiff by complying with Article 8307, Sections 4-2 and 5, V.A.C.S., and otherwise, both before the Industrial Accident Board and in this Honorable Court, and this appeal from said Board's final award of April 30, 1959.

4.

That your cross-plaintiff, on or about October 8, 1957, while in the course and scope of his employment working for American Bridge Division, United States Steel Corporation in Orange County, Texas, sustained a severe, and permanent, personal, accidental injury; that said employer at all times pertinent hereto was engaged in the general construction work and other operations incidental thereto in Orange County, Texas, and was qualified to and did carry workmen's compensation insurance for its employees who might receive accidental injuries in the course of their employment with such employer, said policy of workmen's compensation insurance being acquired from and issued by your cross-defendant herein, whereby your cross-defendant obligated and bound itself to pay the benefits provided by the Workmen's Compensation Law of the State of Texas to those employees of American Bridge Division, United States Steel Corporation, who might receive accidental injuries while in the course of their employment with such employer; that said policy has been in full force and effect continuously since the day it originally became effective; that at such time your cross-plaintiff was an employee of such concern working for said employer under a written contract of employment as such, or in the alternative, an oral contract, and while so employed on or about October 8, 1957, your cross-plaintiff sustained accidental injuries hereinafter more particularly set forth.

5.

(a) That your cross-plaintiff sustained accidental injury to his body while in the course of his employment for American Bridge Division, United States Steel Corporation in Orange County, Texas, on or about October 8, 1957 on a construction job; that while in the process of welding on a large bridge beam your cross-plaintiff tried to lift one end of said bridge beam; that as he lifted he suddenly experienced an excruciating pain as though something tore loose in his lower back; that said accidental injury has naturally resulted in permanent and total incapacity to the body generally as well as permanent and total incapacity from the date of injury to the muscles, tissues, lig-

aments, sinews, nerves, tendons and bony structure of his neck, spine, lower back, pain down the back of both legs to the mid thigh severe enough to keep him awake which pain is considerably aggravated by any type of strain such as coughing, sneezing, climbing, stooping, or lifting as well as by changes of the weather and said pain is accompanied with frequent headaches, nausea, tenderness in lumbo-sacral region of the back, severe lumbo-sacral sprain or strain, sacro-iliac sprain or strain, ruptured intervertebral disc at L5-S1, compressed fracture in the lower back all of which has produced said total incapacity to your cross-plaintiff's body from the date of injury and for a period of 401 weeks; and said accidental injury, upon occurring, left your plaintiff with pains similar to a burning fire, making him nauseated, resulting in his having to be under the constant care and treatment of physicians to alleviate his suffering to no avail.

(b) Subject to Defendant's Motion to Strike on file herein and without waiving same but still insisting thereon your cross-plaintiff would show that if the evidence should show that he had any pre-existing conditions, diseases or anomalies in the portions of his body aforesaid that said conditions were dormant and in no respect were they disabling and the said injury aggravated and incited such pre-existing conditions, thereby producing your cross-plaintiff's total and permanent disability from the date of his injury.

21

6.

Cross-plaintiff's average wage, regardless of the manner in which it is computed, entitles him to the maximum benefits of workmen's compensation payments in the amount of thirty-five and no/100 ($35.00) Dollars per week for the period of his disability.

7.

That the Industrial Accident Board of Texas, having jurisdiction of your plaintiff's claim for compensation did on April 30, 1959, render its final decision, order and decree in the matter; that said award was contrary to law and inconsistent with your cross-plaintiff's physically incapacitated condition and should, therefore, be set aside and held

for naught; that following said award your plaintiff did, within the statutory time, file with said Industrial Accident Board notice of his dissatisfaction with the award of said Board and of his intention to appeal therefrom; that within the statutory time following the filing of said notice of appeal your cross-plaintiff has filed this cross-action or cross-appeal in this Honorable Court.

8.

(a) That your cross-plaintiff gave due and timely notice to his employer and your defendant of such accidental injury to your cross-plaintiff, said notice of injury being within less than thirty (30) days following the date of such injury reported to cross-plaintiff's employer and to the Industrial Accident Board of Texas.

(b) That following your cross-plaintiff's injuries your cross-plaintiff filed his formal claim for compensation for his injuries with his employer and with your cross-defendant and with the Industrial Accident Board of Texas, within the time and in the manner required by law.

9.

(a) That your cross-plaintiff is entitled to have such compensation paid to him in a lump sum because of the fact that since his injury he has accumulated large indebtednesses both for food for himself and his family and for necessary and proper medical treatment in an attempt to alleviate his condition; that his family is necessarily dependent upon him for support; that whatever compensation awarded your plaintiff by virtue of this suit will be computed at the rate of sixty (60%) per cent of his average weekly wage, but not to exceed thirty-five ($35.00) dollars per week for the period allowed, and same will be discounted at the rate of four (4%) per cent in the event of a lump sum award; that your plaintiff has contracted and agreed to pay his attorney a fee of twenty-five and no/100 per cent (25%) of whatever is recovered herein, subject to the approval of the Court; that the small weekly payments of twenty-six and 25/100 ($26.25) dollars which plaintiff would be due under the law therefore would be inadequate. Therefore, taking into consideration your plaintiff's loss

of earning power, his need for additional treatment for his condition, the amount of his indebtednesses, all of which must be paid by your plaintiff out of his recovery herein, considering that your plaintiff should be placed in a
23 position to invest the money due him in some business that will earn him a livelihood, your plaintiff therefore alleges that unless he is awarded his compensation in a lump sum he will suffer manifest hardship and injustice.

(b) That your plaintiff further alleges that in addition to the above and foregoing allegations that by virtue of his necessitous circumstances that in the event this be a case where compensation is payable weekly at a definite sum and for a definite period that by virtue of your plaintiff's necessitous circumstances and poverty-stricken condition that said weekly amounts of compensation to be paid will therefore be inadequate to meet the necessities of your plaintiff, and that therefore the amount of compensation due and owing should be increased by correspondingly decreasing the number of weeks for which the same is to be paid, allowing defendant discount for present payment at the rate of four (4%) per cent compounded annually as provided by Section 15 (A) of Article 8306, Revised Civil Statutes of Texas, and as amended.

10.

Your cross-plaintiff has employed the law firm of Joe H. Tonahill of Jasper, Texas, as his attorney to represent him in this case, and has contracted and agreed to pay said attorney a reasonable fee for his services, subject to the approval of this Honorable Court, but not to exceed one-fourth (¼) of any recovery herein.

Wherefore, premises considered, cross-plaintiff prays that the cross-defendant be cited to appear and
24 answer this complaint and that upon final hearing hereof, your cross-plaintiff have judgment against your cross-defendant for four hundred one (401) weeks workmen's compensation insurance at the rate of thirty-five and no/100 ($35.00) dollars per week, payable in a lump sum, together with four (4%) per cent interest on all past due installments, for costs of Court, and for such other,

further, and different relief to which your cross-plaintiff may show himself justly entitled, at law and in equity.

JOE H. TONAHILL,
By FLOYD W. ADDINGTON,
Floyd W. Addington,
Attorneys for cross-plaintiff.

Jasper, Texas.

I do hereby certify that a true copy of this instrument constituting motion to strike, original answer of defendant, and cross or counter-claim of defendant has on this 25th day of May, 1959 been duly forwarded by United States mail in an envelope properly addressed to the attorneys for plaintiff, Mr. Howell Cobb, First Federal Savings Building, Beaumont, Texas.

FLOYD W. ADDINGTON,
Floyd W. Addington.

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25 IN UNITED STATES DISTRICT COURT

Plaintiff's Reply to Defendant's Motion to Dismiss—Filed May 29, 1959

Comes Now Liberty Mutual Insurance Company, plaintiff in the above entitled and numbered cause, and files this its reply to motion to dismiss heretofore filed by the defendant.

I.

This is a workmen's compensation case arising out of an accidental injury allegedly sustained by Emmett Horton on October 8, 1957, while in the course of and scope of his employment for the United States Steel Corporation, American Bridge Division, Orange County, Texas. The Industrial Accident Board of Texas made its award on April 30, 1959 and on the same day, Liberty Mutual Insurance Company filed its notice of dissatisfaction and intention to appeal from said award and subsequent to such filing, did on April 30, 1959, file its suit in this Court to set aside the award. The award was for One Thousand Fifty Dollars ($1,050.00) as alleged in its original petition.

II.

Attached hereto as Exhibit A is a certified copy of Employee's Notice of Hearing and Statement filed with the Industrial Accident Board, March 30, 1959, which shows that the employee, Emmett Horton, by and through
26 his attorney, Floyd W. Addington claimed that the nature of injury was Total and Permanent disability. In addition, by his claim, a copy of which is attached hereto as Exhibit B, Emmett Horton states that he had been working eight hours per day, five days per week at a rate of Two and 33/100 Dollars ($2.33) per hour, which sum is in excess of Eighty-five Dollars ($85) per week and sufficient to entitle him to the compensation rate of Thirty-five Dollars ($35) per week. Such claim totals Fourteen Thousand Thirty-five Dollars ($14,035), exclusive of interest and costs. Plaintiff would respectfully show unto the Court that in suits brought by the insurer to set aside the Board's award, the claim made by the employee before the Industrial Accident Board of Texas determines the jurisdictional amount. In this connection, in Booth vs. Texas Employers' Insurance Association, 132 Tex. 237, 123 S.W. 2d, 322 (1938), Judge Smedley speaking for the Commission of Appeals states at page 331:

"When the claim filed with the Board shows the amount claimed, in dollars or cents, or by statement of facts from which an amount can definitely be determined and the award of the Board is less than the amount of that claim, the amount shown by the claim is the amount in controversy, and suit should be filed in the Court having jurisdiction of that amount."

The opinion was adopted by the Supreme Court of Texas.

III.

On May 6, 1959, one week following the filing of the captioned case by plaintiff herein, Emmett Horton,
27 defendant herein, filed a separate suit in the District Court of Orange County, Texas, seeking to recover total permanent disability or the sum of Fourteen Thousand Thirty-five Dollars ($14,035.00) as shown by the attached Exhibit C. This shows that both before the captioned suit

was filed, and after, Emmett Horton has claimed and does claim Liberty Mutual Insurance Company, plaintiff herein, owes him Fourteen Thousand Thirty-five Dollars ($14,035.00) for total permanent disability.

IV.

Defendant states in his motion to dismiss that no notice of dissatisfaction of the award of the Board was filed by the plaintiff herein. Such notice was filed on April 30, 1959. Even if same was not filed, it would be a disputed issue of fact to be determined upon the trial of the case, the contentions of the plaintiff herein by its pleadings raising that issue and defendant should be required to put the question of notice in issue on the trial upon the merits.

V.

Defendant claims that he does not know when the summons and complaint were served upon him. The Marshal's return upon the original summons on file in this Court shows that same was served on May 5, 1959. Defendant certainly knows the date that the Marshal served with him with summons and complaint. His answer date is due twenty (20) days following such service.

28 Wherefore, premises considered, plaintiff respectfully prays that the defendant's motion for dismissal be, in all things overruled and denied.

Respectfully submitted,

HOWELL COBB,
Howell Cobb,
Attorney for Plaintiff.

First Federal Savings Building,
Beaumont, Texas.

On this 28 day of May, 1959, defendant was furnished with a copy of the above and foregoing reply, by mailing a copy of same in the United States Mails to his attorney, Floyd W. Addington, Post Office Box 179, Jasper, Texas.

HOWELL COBB,
Howell Cobb.

8. ☒ **Orders** The carrier is to deduct from this award and to pay to the above named attorney's a fee on the unpaid portion of this award, in the amount of 25% of the amount ordered paid

This is the final award in the above case. Any party who is dissatisfied with this award may appeal to the Superior Court in and for the County of New Castle within 30 days from the date of this award by filing with the Prothonotary of said County a notice in writing stating the cause or causes for which he seeks to have the award reviewed and a copy thereof shall forthwith be served upon the adverse party or parties.

DATED this 30th day of April A.D. 19 99

THE INDUSTRIAL ACCIDENT BOARD

IAB 10-68

12

THE STATE OF TEXAS

INDUSTRIAL ACCIDENT BOARD

AUSTIN

I, Les Moreland, Secretary of the Industrial Accident Board of the State of Texas, DO HEREBY CERTIFY that the attached and foregoing is a full, true and correct copy of EMPLOYEE'S NOTICE OF HEARING AND STATEMENT

S-46626

EMMETT HORTON — EMPLOYEE

VS.

UNITED STATES STEEL CORPORATION, AMERICAN BRIDGE DIVISION — EMPLOYER

and which now appears of record in this Department in the Secretary's File captioned S-46 26

I further certify that said instrument was received and filed in this office on March 30, 1959

Motion to Dismiss

EMPLOYEE'S NOTICE OF HEARING AND STATEMENT

EMPLOYEE. Emmett Morton
Route 2
Newton, Texas

NOTICE MAILED CLAIMANT	DATE OF HEARING	BOARD NUMBER
3-06-39	3-23-39	[illegible]
EMPLOYER NO.	[illegible]	

INDUSTRIAL ACCIDENT BOARD

1 Wm. Joe H. Tomahill, Attorney
Tomahill Building
Jasper, Texas

VS

EMPLOYER United States Steel Corporation, American
Bridge Division
2 P.O. Box 391
Orange, Texas

INSURANCE CARRIER

Liberty Mutual Insurance Company
3 Century Building, 8100 Travis
Houston 8, Texas

cc:

Blanchard & Baker

Date of injury 10-8-37 Total and Permanent Disability

NO ACTION WILL BE TAKEN BY THE BOARD UNTIL CLAIMANT ANSWERS ALL QUESTIONS

In support of my claim, I submit the following information for

A EMPLOYMENT

Are you working now? ☐ Yes ☒ No

4 Name of employer

5 Where did you return to work?

At what wage?

B INJURY

Were you injured in your employer's place of business?
☒ Yes ☐ No

6 On what date were you injured? April 7 1937

On what day did you report your injury? October 8 1937

To whom did you report your injury?
Name Bob Francis
Title Boss

Give name and address of eye witness
Name Co-employees
Address
Name
Address

Have you ever filed any other claim for Workmen's Compensation?

If so give dates of injury

C

If the Insurance Company [illegible] you feel you are entitled to have your claim or [illegible] please submit [illegible]

If employee has died, give names, ages and relationship of [illegible]

MAR 30 1939

TEXAS INDUSTRIAL ACCIDENT BOARD

31 **Exhibit B to Plaintiff's Reply to Defendant's Motion to Dismiss**

Notice of Injury and Claim for Compensation

Texas Workmen's Compensation Law

Administered by Industrial Accident Board—Walton Bldg., Austin, Texas

My full name is (First) Emmett (Middle) (Last) Horton. Social Security No. 458-30-7729.

Age 33.

My employer was (Name) American Bridge Division, United States Steel Corporation, (Address) Orange, Texas.

I was injured in (Mo.) October (Day) 8, (Yr.) 1957 in (City) Orange, (County) Orange, (State) Texas.

Were you hired in Texas? Yes.

If accident occurred outside Texas, on what date were you transferred to state where accident occurred? (Month, Day, Year) .....

I was working 8 hours per day 5 days per week at $2.33 per (Hour-Day-Week-Month) hr.

My average weekly wage was $.....

32 How long had you been working for this employer? 4 months.

Were you paid wages for date of injury? Yes.

I started losing time on (Month) October (Day) 8, (Year) 1957.

Are you now receiving compensation? No.

Have you been paid any compensation? No.

If so, how much per week $..... For how many weeks have you been paid? .....

Have you returned to work? No. If so, on what date? (Mo., Day, Yr.) .....

Describe accident and your injury (In your own words) A co-employee and I were welding on a bridge beam which weighed approximately 1200 pounds. I was working at one end of the beam and my co-employee was working at the other end. They were in a hurry to get it finished and would not wait to get a crane to lift the beam, so we tried to turn it over. When I lifted on the end of it where I was working, something suddenly popped and felt as if it tore loose in my back with severe pain and a hot, burning sensation in my back. The injury was to my back and spine,

and the pain extended down into both my legs, I suffer severe headaches, and the severe pain from my back and spine causes nauseation.

33 Was any part of your body amputated? .....

If so, name member and give point of amputation.

.....

Were you sent to a doctor or hospital by your employer or his insurance company? Yes.

Please give as much of the following information as you have:

Name and address of doctor: Dr. Allen and Dr. James, Orange, Texas; and Dr. Love at the .....

Name and address of hospital: Newton County Hospital, Newton, Texas.

I was hospitalized 3 times.

Name of employers insurance company: Liberty Mutual Insurance Company.

My average weekly wage was $.....

Name and address of nearest relatives: Marcell Horton (wife) Rt. 2, Newton, Texas.

I hereby give notice of injury and file claim for compensation due me under Workmen's Compensation Law of Texas.

I request that the Industrial Accident Board (Check one)

☐ Not take further action until requested by me.

34 ☒ Act on my claim as soon as possible.

Date Signed December 10, 1957.

Signature of injured employee:

EMMETT HORTON.

Street Address:

Route 2,

(City and State) Newton, Texas.

Witness to Signature:

.....

Exhibit C to Plaintiff's Reply to Defendant's Motion to Dismiss

Joe H. Tonahill
Lawyer
Jasper, Texas

John H. Beale
Associate

Phone 14

IN THE DISTRICT COURT OF ORANGE COUNTY, STATE OF TEXAS

No. 12,365

EMMETT HORTON,

VS.

LIBERTY MUTUAL INSURANCE COMPANY.

Plaintiff's Original Petition

To the Honorable Judge of said Court:

Comes now Emmett Horton, plaintiff in the above entitled and numbered cause, complaining of Liberty Mutual
35 Insurance Company, incorporated under the laws of Massachusetts, hereinafter for brevity styled defendant, and for cause of action respecfully represents unto the Court as follows.

I.

That your plaintiff is a resident citizen of Newton County, Texas; that your defendant is a Massachusetts corporation operating pursuant to the laws and permit of the State of Texas with a permit at all times pertinent hereto to do business in Orange County, Texas; that service of process may be had upon the defendant by serving the Commissioner of Insurance, State Capitol Building, its duly authorized agent, Austin, Texas.

II.

That all conditions precedent to the acquisition of jurisdiction by this Honorable Court have been fully complied with by your plaintiff by complying with Article 8307, Sections 4-a and 5, V.A.C.S., and otherwise, both

before the Industrial Accident Board and in this Honorable Court and this appeal from the Industrial Accident Board's final award of April 30, 1959.

III.

That on or about October 8, 1957, your plaintiff was an employee of United States Steel Corporation, American Bridge Division in Orange County, Texas, which employer at all times pertinent had been issued a Texas workmen's compensation insurance policy by defendant which
36 covered your plaintiff against industrial accidental injuries and which policy was in full force and effect; that on said aforesaid date your plaintiff sustained accidental injury to his body while in the course of his employment for said employer in Orange County, Texas, which accidental injury has naturally resulted in total permanent incapacity to the body generally from the date thereof, making your defendant liable to your plaintiff in the lump sum and amount of Fourteen Thousand, Thirty-Five ($14,035) Dollars for which amount your plaintiff comes now and sues together with legal interest thereon.

IV.

Plaintiff's average wage, regardless of the manner in which it is computed, entitles him to the maximum benefits of workmen's compensation payments in the amount of thirty-five and no/100 ($35.00) dollars per week for the period of his disability.

V.

Your plaintiff has agreed to pay his attorney, Joe H. Tonahill, of Jasper, Texas the maximum per cent of any recovery herein, subject to the approval of the Court.

VI.

Your plaintiff reserves the right to amend this petition and enlarge upon the facts pertinent to his injury and claim for compensation benefits.

Wherefore, premises considered, your plaintiff prays that defendant be cited to appear and answer herein,
37 that he have judgment against defendant in the amount of Fourteen Thousand, Thirty-five ($14,035.00) Dollars workmen's compensation benefits, together with legal interest and costs, and for such other, further, and different relief to which he may show himself justly entitled at law and in equity.

JOE H. TONAHILL,
By FLOYD W. ADDINGTON,
Attorneys for Plaintiff.

P. O. Box 179,
Jasper, Texas.

The State of Texas

To: Liberty Mutual Insurance Company, upon whom service of process may be had by serving the Commissioner of Insurance, State Capitol Building, Austin, Texas, Defendant, Greeting:

You Are Hereby Commanded to appear before the Honorable District Court, 128th Judicial District of Orange, County, Texas, at the Court House of said county in Orange, Texas, by filing a written answer, at or before 10 o'clock a.m. of the Monday next after the expiration of twenty days after the date of service of this citation, to Plaintiff's Petition filed in said Court on the 6th day of May, A. D. 1959, numbered 12,365 on the docket of said Court, and styled.

38 EMMETT HORTON, *Plaintiff*,

VS.

LIBERTY MUTUAL INSURANCE COMPANY, *Defendant.*

The nature of Plaintiff' demand is set out and shown by a true and correct copy of Plaintiff's Petition, accompanying this citation, and made a part hereof.

If this citation is not served within ninety days after the date of its issuance, it shall be returned unserved.

The officer executing this writ shall promptly serve the same according to requirements of law, and the mandates hereof, and make due return as the law directs.

Issued and given under my hand and the seal of said Court at Orange, Texas, this the 6th day of May, A. D. 1959.

Attest:

MRS. T. M. DODD,
Clerk, District Court, Orange County, Texas,

By ETHEL BURTON,
Deputy.

(Seal)

* * * * * *

File No. 12,365. Citation for Personal Service (District Court). Emmett Horton vs. Liberty Mutual Insurance Company. In District Court of 128th Judicial District, Orange County Texas. Issued This 6th day of May, 1959. Mrs. T. M. Dodd, Clerk, District Court By Ethel
39 Burton, Deputy. Filed this ... day of ... 19.. At ....o'clock ..M.

* * * * * *

Delivered this 8 day of May, 1959. T. O. Lang, Sheriff of Travis County, Texas, J. C. Hester, Deputy.

* * * * * *

I hereby certify this notice was served on me May 8, 1959, by the Sheriff of Travis County, Texas, Wm. A. Harrison, Commissioner of Insurance, State of Texas.

The State of Texas.
Industrial Accident Board.
Austin.

I, Les Moreland, Secretary of the Industrial Accident Board of the State of Texas, Do Hereby Certify that the attached and foregoing are full, true and correct photostatic copies of certain instruments which appear of record in this Department in the claim numbered and styled S-46626.

EMMETT HORTON, *Employee*,

vs.

UNITED STATES STEEL CORPORATION, AMERICAN BRIDGE DIVISION, *Employer*.

I further certify that certain of said instruments bear the "receiving stamp" of the Industrial Accident Board and that each of said instruments bearing said
40 stamp was received and filed in this office on the date shown by said indorsement thereon.

I further certify that I have the custody of the records of the Industrial Accident Board of the State of Texas.

In Testimony Whereof, I have hereunto signed my name officially and caused to be impressed hereon the Seal of the Industrial Accident Board at its offices in the Walton Building in the City of Austin, Texas, on this 25th day of May, A. D. 1959.

LES MORELAND,
Secretary.

April 30, 1959.

1 only

Board No. S-46626
Claim No. C75 61747 R
Emmett Horton vs
United States Steel Corporation

Industrial Accident Board,
Walton Building,
Austin, Texas.

Gentlemen:

This is to notify you that the Liberty Mutual Insurance Company is not willing to, and does not consent to abide by the final ruling, decision and award of the Industrial Accident Board, under date of April 30, 1959, in favor of Emmett Horton, and his attorney of record, Mr. Joe H. Tomahill of Jasper, Texas, in case of Emmett Horton, employee against United States Steel Corporation, American Bridge Division, employer, and the Liberty Mutual Insurance Company, insurer, and will within twenty days from date of service file suit in a court of competent jurisdiction for the purpose of setting aside said final ruling, decision and award.

This Notice is given as is provided in Section 5, Part II of Article 8307.

RECEIVED
APR 30 1959
TEXAS INDUSTRIAL ACCIDENT BOARD

Respectully submitted,

LIBERTY MUTUAL INSURANCE CO.,

By _____
For the Company

Personal service is herety acknowledged this the 30th day of April , A. D., 1959.

INDUSTRIAL ACCIDENT BOARD

By Lula Martin

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused to be impressed hereon the Seal of the Industrial Accident Board at its offices in the Walton Building in the City of Austin, Texas, on this 4th. day of May, A.D. 1959

Name Boss

Give name and address of eye witnesses

Name Co-employers

Address

Name

Address

Have you ever filed any other claim for Workmen's Compensation?

If so give dates of injury

4

RECEIVED
MAR 29 1929
INDUSTRIAL
ACCIDENT BOARD

Witness Signature

Dated March 28, 1929

ONE COPY OF THIS STATEMENT MUST BE IN THE HANDS OF THE INDUSTRIAL ACCIDENT BOARD BY DATE OF HEARING

3

42 IN THE UNITED STATES DISTRICT COURT

**Plaintiff's Reply to Defendant's Motion to Strike—
Filed Jun. 4, 1959**

Comes Now Liberty Mutual Insurance Company, plaintiff herein and files this its reply to defendant's motion to strike certain matters in its pleadings and would show the Court the following:

1.

In Cause No. 11,986 in the District Court of Orange County, Texas, suit was brought by Emmett Horton against Liberty Mutual Insurance Company to set aside the compromise settlement agreement. In that suit Horton alleged only disability for 82 weeks. The main issue decided in that case was whether the compromise settlement agreement entered into by and between Horton and Liberty Mutual should be set aside on the grounds of fraud. It was so set aside and the issues as to Horton's disability being due solely to other diseases, conditions, was not properly in the suit because even a favorable answer would have had no effect on the main question in the case, that is the release and compromise settlement agreement. Further as to any disability above that alleged in Cause No. 11,986 in Orange County District Court, Liberty Mutual Insurance Company should not be barred from pleading that Horton's disability was due to other conditions, since he in no way placed that at issue in such other suit

43 Wherefore, plaintiff prays that defendant's motion to strike be in all things overruled, and for such other relief as it may be justly entitled to receive.

HOWELL COBB,
Howell Cobb,
Attorney for Plaintiff.

First Federal Savings Building,
Beaumont, Texas.

On this 3 day of June A. D. 1959 a copy of the above and foregoing reply was furnished defendant's attorney, Mr. Floyd W. Addington by mailing a copy of same to his address, Post Office Box 179, Jasper, Texas.

HOWELL COBB,
Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

Memorandum Decision—June 19, 1959

Plaintiff, a Massachusetts corporation, instituted this suit on April 30, 1959, against the Defendant, a resident and citizen of Newton County, Texas, seeking to set aside an award of the Industrial Accident Board of the State of Texas made by that Board on April 30, 1959, ordering the Plaintiff to pay to Defendant Workmen's Compensation benefits under the Workmen's Compensation law of the State of Texas for 30 weeks at the rate of $35.00 per week
44 because of incapacity to labor that the Defendant suffered as a result of an accidental personal injury he sustained on or about October 8, 1957, while in the course of his employment with his employer, American Bridge Division, United States Steel Corporation. In its original complaint Plaintiff alleges, in effect, that the Defendant in his claim before the Industrial Accident Board of the State of Texas alleged that as a result of his said injury of October 8, 1957, he suffered total and permanent incapacity to labor and as a result thereof was entitled to be paid by the Plaintiff compensation benefits at the rate of $35.00 per week for 401 weeks or the aggregate sum of $14,035.00. Based on such last mentioned allegations and the diversity of citizenship that exists between the Plaintiff and the Defendant, Defendant asserts jurisdiction of this Court of this cause under the provisions of 28 U.S.C.A. 1332 as amended by the Eighty-fifth Congress.

On May 25, 1959, the Defendant filed a motion to dismiss this cause for want of jurisdiction alleging among other grounds that the amount in controversy was less than $10,000.00 because the aggregate amount of the award of the Industrial Accident Board of the State of Texas which Plaintiff by this suit is seeking to set aside was $1,050.00. On the same date, alleging that same was being filed subject to its said motion to dismiss, the Defendant filed its answer to Plaintiff's complaint and a cross-complaint against the Plaintiff in which cross-complaint he sought to recover from the Plaintiff Workmen's Compensation benefits because of incapacity to labor he claims he suffered as a result of his October 8, 1957, injury, above mentioned for 401 weeks at the rate of $35.00 per week, or for the

aggregate sum of $14,035.00. The facts as shown by
45 the record in this case, including Plaintiff's motion to dismiss and the attachments thereto and Plaintiff's reply to Defendant's motion to dismiss and the attachments thereto, are as follows: The Defendant in his claim before the Industrial Accident Board claimed in effect, that he was totally and permanently disabled as a result of his injury on October 8, 1957, and that because thereof he was entitled to be paid Workmen's Compensation benefits by the Plaintiff for 401 weeks at the rate of $35.00 per week. The award of the Industrial Accident Board, which Plaintiff seeks to set aside in this action, awarded Plaintiff Workmen's Compensation benefits only for the aggregate sum of $1,050.00. On April 30, 1959, the Plaintiff duly gave notice to the Industrial Accident Board of the State of Texas of its intention to appeal from said award of the Industrial Accident Board. On May 6, 1959, Defendant filed a suit against the Plaintiff in the District Court of Orange County, Texas, seeking to recover therein Workmen's Compensation benefits at the rate of $35.00 per week for 401 weeks for the incapacity to labor he claims he has suffered and will suffer as a result of his October 8, 1957, injury.

Although the Plaintiff admits that the award of the Industrial Accident Board which it seeks to set aside in this cause was only for the aggregate sum of $1,050.00, it contends that the amount in controversy herein exceeds the sum of $10,000.00, exclusive of interest and costs since the Defendant claimed before the Industrial Accident Board of the State of Texas that he was entitled to Workmen's Compensation benefits in the aggregate amount of $14,035.00. In so contending, the Plaintiff relies on Booth v. Texas Employers' Ins. Ass'n., 123 S.W. 2d 322.

46 The identical question presented here was before Judge Estes in the United States District Court for the Northern District of Texas in National Surety Corp. v. Chamberlain, 171 F. Supp. 591. Judge Estes sets forth his reasons in an excellent opinion, concluding that in a situation such as is presented in the instant case the Federal Courts are without jurisdiction because the requisite jurisdictional amount is not involved. Being of the opinion that Judge Estes properly construed the law, in that case, I have concluded that this Court does not have jurisdiction of this

cause because the amount in controversy does not exceed the sum of $10,000.00, exclusive of interest and costs.

Defendant's motion to dismiss for want of jurisdiction will be sustained. Since Defendant's cross-claim was filed subject to his motion to dismiss Defendart's cross-claim will likewise be dismissed.

Dated this 19th day of June, 1959.

(S.) JOE W. SHEEHY,
United States District Judge.

IN UNITED STATES DISTRICT COURT

Order of Dismissal for Want of Jurisdiction—July 20, 1959

Be It Remembered on this the 20th day of July, A. D. 1959, came on to be considered the motion of the defendant, Emmett Horton, to dismiss the above entitled and numbered cause on the ground that the jurisdictional amount
47 of this Court was not involved, and the Court being of the opinion that the jurisdictional amount in this cause is the sum of $1,050.00, the award of the Industrial Accident Board made and entered April 30, 1939 is the amount in controversy, and further being of the opinion that the defendant's motion to dismiss for want of jurisdiction should be in all things granted and sustained;

It is, therefore, Ordered, Adjudged and Decreed that the above entitled and numbered cause be, and the same is hereby, dismissed for want of jurisdiction of this Court, to which action of the Court the plaintiff in open Court excepted and objected and gave its notice of appeal to the United States Court of Appeals for the Fifth Circuit at New Orleans, Louisiana.

Rendered and Entered this the 20th day of July, A.D. 1959.

(S.) JOE W. SHEEHY,
Joe W. Sheehy,
Judge Presiding.

Approved as to Form:

(S.) FLOYD W. ADDINGTON,
Floyd W. Addington,
Attorney for Defendant.

(S.) HOWELL COBB,
Attorney for Plaintiff.

48 IN UNITED STATES DISTRICT COURT

Notice of Appeal—Filed Jul. 30, 1959

In the United States District Court in and for the Eastern District of Texas, Beaumont Division.

Civil Action No. 4162

LIBERTY MUTUAL INSURANCE COMPANY,

VS.

EMMETT HORTON.

Comes Now the plaintiff, Liberty Mutual Insurance Company, and after the Motion for Dismissal had been granted by the Court, and in due and timely fashion files this its Notice of Appeal to the United States Court of Appeals for the Fifth Circuit sitting at New Orleans, Louisiana.

Dated this 30 day of July, A. D. 1959.

HOWELL COBB,
Howell Cobb,

ORGAIN, BELL & TUCKER,
Attorney for Plaintiff, Liberty Mutual Insurance Company.

First Federal Savings Building,
Beaumont, Texas.

---

49 Bond on appeal for $250.00 and filed July 30, 1959
(Omitted in printing)

---

50 **Designation of Record—Filed July 30, 1959**

(Omitted in printing)

---

52 **Clerk's Certificate**

(Omitted in printing)

54 IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17958

LIBERTY MUTUAL INSURANCE COMPANY, *Appellant*,

versus

EMMETT HORTON, *Appellee*.

Appeal from the United States District Court for the Eastern District of Texas.

Opinion—February 22, 1960

Before RIVES, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

HUTCHESON, Circuit Judge: This is an appeal from a judgment dismissing for want of jurisdiction a workmen's compensation suit filed by appellant, Liberty Mutual Insurance Company, in the United States District Court for the Eastern District of Texas. It was brought to set aside an award of the Industrial Accident Board of Texas, and to be relieved from the em-
55 ployee's claim against it that he became totally and permanently disabled and entitled to an award, under the Texas Compensation Act, of $14,635.00, as a result of an accidental injury incurred while in the course of his employment on a job where Liberty Mutual Insurance Company was the compensation insurer.

Jurisdiction was founded upon diversity of citizenship: in that appellant is a Massachusetts corporation and Emmett Horton is a resident citizen of Texas; and upon the good faith allegation that more than $10,000.00 was in controversy: in that Horton allegedly was injured on October 8, 1957, while employed by American Bridge Division of United States Steel Corporation in Orange County, Texas; that Liberty Mutual Insurance Company, appellant, was the workmen's compensation carrier for the employer; that Horton filed his statement with the

Industrial Accident Board claiming total and permanent disability at a rate of $35.00 per week for 401 weeks, or a total of $14,035.00; and that on April 30, 1959, the Board entered its award allowing Emmett Horton $35.00 a week for 30 weeks, a total of $1050.00.

Horton answered, and, in addition, filed a cross-action for total and permanent disability, 401 weeks at $35.00 a week, a total of $14,035.00, alleging diversity of citizenship and an amount in excess of $10,000 in controversy.

On motion by Horton to dismiss the suit for want of jurisdiction, the district judge turned his face away from the controlling decision of the Texas Supreme Court
56 and from the many decisions of this court, declaring that Federal Court Jurisdiction in Texas Workmen's Compensation suits is a special jurisdiction and, in exercising it, the court is bound by, and must strictly follow, the construction placed on the statutes by the state courts. Advancing as his sole reason for doing so his reliance on *National Surety Co.* v. *Chamberlain*, 171 Fed. Supp. 591, an opinion of the District Court for the Northern District of Texas, he declined to follow the settled law to the contrary, and, holding that there was no jurisdiction in the federal court, since the order of the board was for less than $10,000.00, the amount in controversy was less than the requisite jurisdiction, he dismissed both the original action and the counter claim.

Appealing from this order, the insurer is here insisting that, for the reason set out in the margin,[1] the district

[1] (a) In a suit founded upon diversity of citizenship filed by the insurer directly in Federal Court under the Texas Workmen's Compensation Law, the amount in controversy is ascertained by the amount claimed by the employee before the Industrial Accident Board, since the right the insurer seeks to protect is the right to be free from the claimed liability. Cf. Booth v. Texas Employers, 123 SW(2) 322 (1938); and General Acc. v. Mostert, 131 F(2) 596 (1942).

(b) Upon the record in the present case, it cannot be said that appellant's suit was not brought in good faith, nor that as a legal certainty the amount of claimed liability from which appellant seeks relief will not, under Texas law, be successfully asserted against it.

(c) The court erred in dismissing this action for an additional reason. By filing his cross-complaint appellee affirmatively requested the court to decide the controversy alleged to exist in appellant's complaint and to grant him the sum of $14,035.00 as compensation which is the precise sum appellant alleged to be in controversy.

court erred in holding that the amount in controversy did not exceed $10,000.00, and in dismissing the cause.
57 For the reasons following and upon the authorities hereafter set down, we agree that this is so.

Under Article 8307, Section 5, Vernon's Texas Statutes, either party may bring a de novo action to set aside an award. In the authoritative case of *Booth* v. *Texas Employers Insurance Association*, 123 SW(2) 322 (Tex. Com. App. opinion adopted by the Supreme Court, 1938), a thorough analysis of the procedures of the Workmen's Compensation Law was made. At page 328 the court says:

> ". . . The suit to set aside an award of the board is in fact a suit, not an appeal. It is filed as any other suit is filed and when filed the subject matter is withdrawn from the board. Section 5, as amended, of Article 8307, prohibits the board from proceeding further toward the adjudication of the claim after the filing of the suit. The trial in court is de novo, wholly without reference to what may have been decided by the board. It is true that as conditions precedent to the filing of suit the insurer or the employer must have been notified of the injury, claim must have been filed with the board, and the board must have made a final ruling and decision (Section 4a, Article 8307), but these requirements do not negative the fact that a suit is filed and tried, not merely an appeal taken."

Thus, as interpreted by the Supreme Court of Texas, proceedings before the Industrial Accident Board are viewed as mere procedural preliminaries to suit, the so-called "appeal" being in actuality an original action. Once
58 the suit is brought, the Board's findings and award are totally abrogated.

Yet the claim before the Board does have the binding substantive effect of fixing the extent of the insurer's liability as claimed by the employee. In 123 SW(2) 322, at page 329, the court declares:

> "It has repeatedly been held that, although one claim cannot be filed with the board and another and different claim asserted in court yet when the injury suffered is of that class of injuries, sometimes called

general injuries, for which the compensation is based upon incapacity to work, and not of that class of injuries usually called specific injuries, for which the amount of compensation is fixed by the statute, a general description of the injury is sufficient in the claim made before the board, and that in the suit filed to set aside the award of the board the claim may be enlarged to include all injuries proximately resulting from the accident."

After thus holding, quite logically, that regardless of who files the suit attacking the Board's award, the true controversy concerns the right of the employee to compensation, and, the amount of his claim before the Board fixing the extent of the insurer's claimed liability is the sole indication of the amount actually in controversy, the court, at page 331 sets out the rule governing jurisdictional amount regardless of who files the suit. That rule is:

"When the claim filed with the board shows the amount claimed, in dollars and cents or by statement of facts from which the amount can definitely be
59 determined and the award of the board is less in amount than that of the claim, the amount shown by the claim is the amount in controversy and the suit should be filed in the court having jurisdiction of that amount."

Appellant alleged in its petition that appellee had made a claim before the Board for total and permanent disability and for compensation in the aggregate amount of $14,035.00; while appellee has filed in this cause a cross-claim asking for the same relief and for the same $14,035.00, all growing out of the same controversy.

In 1936, in a Texas Workmen's Compensation suit, *Great American Indemnity* v. *Dominguez*, 84 F(2) 179, an opinion uniformly and many times approved and followed,[2] this court, rejecting a district court ruling, in effect that federal courts, in determining their jurisdiction, are not bound to follow state court rulings, declared:

[2] Digby v. U.S.F. & G., 239 F(2) 569; Pappas vs. Royal Indemnity, 351 F(2) 439.

"We think this ruling out of accord with the decisions of the Texas Courts which we are bound to follow. These are that the jurisdiction of a court to hear a suit to set aside a final ruling and decision of the Industrial Accident Board is absolutely dependent upon plaintiff's pleading and proving exact and literal compliance with the essential statutory steps."

In 1937, this court in *Heard* v. *Texas Corporation*, 87 F(2) 30, at page 32 said:

"It is settled law that the remedy afforded by the Texas Workmen's Compensation Statutes is exclu-
60 sive; that the jurisdiction of the district court is a special jurisdiction, and that in a workmen's compensation case every step provided in the statute must be taken as there presented."

Again, in 1942, after the Supreme Court of Texas had in 1938, in the Booth case, dealt specifically, completely, and authoritatively with the matter of trial court jurisdiction of suits to set aside orders of the Board, this court, in *General Accident* v. *Mostert*, 131 F(2) 596, declared and followed the rule for determining jurisdiction laid down by the Supreme Court of Texas in the Booth case.

In the light of these decisions, we are in no doubt that the district judge in this case was without warrant in determining jurisdiction by any other rule than that there laid down. In addition, we think it clear that, if this court had not already ruled on the matter and it was an open one here, the district court would have erred in denying jurisdiction under the settled federal rule for determining it, as laid down by the Supreme Court in *St. Paul Merc. Indemn. Co.* v. *Red Cab Co.*, 303 U.S. 283 and *Bell* v. *Preferred Life Soc.*, 320 U.S. 238, and by this court in *Colonial Oil Co.* v. *Vining*, 237 F(2) 913, and the many cases from this court cited in it to the same effect. This rule, as restated in the Vining case, is "that the good faith allegations of the complaint, that the matter in controversy exceeds the sum of $3000 [$10,000], exclusive of interest and
61 costs, is sufficient to confer jurisdiction unless it appears elsewhere in the complaint or by proof aliunde that less than that amount is involved."

A further and additional reason why jurisdiction should not have been refused in this case is that it is the long established rule that where, as here, the jurisdictional amount is in question, and a counterclaim is brought in an amount which, in itself or added to the amount claimed in the complaint, adds up to an amount in excess of the minimum jurisdictional amount, jurisdiction is established whatever may be the conclusion viewed from the plaintiff's complaint alone. *Home Life Ins. Co.* v. *Sipp*, 11 F(2) 474 (3 Cir.) (1926); *Roberts Min. & Mill Co.* v. *Schrader*, 95 F(2) 522 (9 Cir. 1938); *Henderson* v. *Maryland*, (5 Cir.) 62 F(2) 107. See also *Isenberg* v. *Biddle*; 125 F(2) 741 (D.C. Cir. 1941); *Switzer Bros.* v. *Chicago Cardboard Co.*, 252 F(2) 407 (7 Cir. 1958). This principle is especially applicable in a compensation suit under the Texas Workmen's Compensation Act, which in terms and as pointed out in the Booth case, recognizes the compensation claimant as the real plaintiff in, and master of the suit[3] when, as he has done here, he seeks affirmative relief by cross-action and demands process thereon. Cf. Barron & Holtzoff, "Federal Practice and Procedure", Rules Ed. Vol. 1, 1958 Pocket Part, Sec. 370, Rule 12:

62 "An involuntary plaintiff who filed an answer seeking affirmative relief against plaintiffs by way of counterclaim submitted to the jurisdiction of the court and waived objection to venue. Hook & Ackerman v. Hirsh, 98 F. Supp. 477."

Cf. *Switzer Bros.* v. *Chicago Cardboard Co.*, *supra*, at p. 411.

The other grounds put forward, in the Chamberlain case and, therefore, by his approval of it by the district judge below, mere make weights whose very statement begs the question proposed to be argued, may be as confidently and summarily disposed of. These are: (1) that federal courts, in order to give full effect to the present amendments withdrawing federal jurisdiction for certain re-

[3] 45 Tex. Jur., "Workmen's Compensation", Chapt. 14, "Appeals to the Courts", Sec. 274 et seq. p. 759, and Chapt. 15, "Trial De Novo", Sec. 285 et seq., fully explains the situation in line with these views. Sec. 295 points out that the statute provides that in all suits to set aside an award the burden of proof shall be upon the party claiming compensation.

moval cases, must in effect rewrite the statute to make it read on original compensation suits authorized by the Texas statute and the uniform course of federal decisions in this state; and (2) that the Texas statutory compensation suit must be analogized to efforts to have state condemnation proceedings reviewed in the federal courts.

Of the first ground, it is sufficient to say that, while federal courts have power to construe and apply the laws of Congress, they have no power to rewrite, expand, or contract them. Therefore, the categorical statement at page 596 of the Chamberlain opinion, "It is certain that congress did not intend the federal court to have jurisdiction in such a case as this", as is pointed out in an excellent 63 Texas Law Review Note, Vol. 38 No. 1, 117,[4] *flies in the face of the act itself limiting its reach to removal cases and is, therefore, mere fiating. In short, Congress has withdrawn removal cases concerning Workmen's Compensation laws from Federal Jurisdiction. Congress was aware that certain Workmen's Compensation suits are filed in Federal Courts, under State laws, as original actions. If the intent of Congress had been to withdraw these*

[4] "As to the congressional intent basis for the decision in the principal case, it would appear that such intent, however clearly expressed, should not have the efficacy of law to extend or to amend the scope of a statute involving jurisdiction. Here Congress withdrew federal jurisdiction for certain removal cases, not original actions. Since jurisdiction of the lower federal courts is based solely upon Congressional grant (See McCormick and Chadbourn, Cases on Federal Courts, Ch. 1 (1957).) federal courts should 'scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' (Healy v. Ratta, 292 U.S. 263, 270 (1934)). *Furthermore, an attempt to apply Congressional intent as law raised additional difficulties in the administration of a federal court system. The policy of reducing litigation in the federal courts is a vague criterion for refusing to accept jurisdiction. Also the policy of allowing the workman his choice of forums is not effected by refusing to accept jurisdiction of original actions where an appeal has been filed in the state court, nor is it defeated by accepting jurisdiction of the original actions, since state courts retain jurisdiction regardless of action in the federal courts.*

"The practical effect of the principal case is that in a controversy meeting federal jurisdiction requirements arising under a state workmen's compensation statute neither party is assured recourse to the federal court when a state administrative agency has obtained jurisdiction since his opponent may defeat federal jurisdiction by filing in the state court. To refuse to accept jurisdiction under these circumstances is to hold that workmen's compensation cases are an exception to the rule that when there is an in personam action involving a money judgment, federal jurisdiction is concurrent with state jurisdiction." (emphasis supplied)

cases also from federal jurisdiction, it would have said so by the simple insertion of the words "or filed in the
64 *United States District Courts". It is highly improper to extend such exclusion without congressional act.*

The second ground is even less substantial. The result of wishful thinking and whistling in the dark, it presents nothing more than shadow boxing, the putting up of a straw man to knock him down. The thing in question here is a thing not of shadow but of substance. It is a right, until Congress takes it away, to bring and maintain in the federal courts on the ground of diversity jurisdiction, suits which, over the long years that have gone since the Texas Workmen's Compensation Act was passed and such suits provided for, have been filed and maintained uniformly in both state and federal courts of Texas,[5] not as a matter of the grace of the courts but of the right of the litigant, a right declared and established long ago by the great Chief Justice, in *Cohens v. Virginia*, 19 U.S. 264, at p. 404, in these memorable words:

> "It is most true, that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp
65 that which is not given. The one or the other would be treason to the constitution."

Such suits will continue to be brought and maintained in the same way until Congress, not the courts, withdraws the right.

The judgment is REVERSED and the cause is REMANDED for further and not inconsistent proceedings.

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[5] In 45 Tex. Jur., p. 730, the text says: "The compensation law does not in terms restrict a review of the decisions of the board to the state courts. Resort is frequently had to the federal courts." Cf. 5 Texas Law Review, p. 448.

66 IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17958

LIBERTY MUTUAL INSURANCE COMPANY,

versus

EMMETT HORTON.

Judgment—Feb. 22, 1960

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings;

It is further ordered and adjudged that the appellee, Emmett Horton be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

---

67 Petition for Rehearing covering 6 pages filed March 14, 1960 omitted from this print.

It was denied, and nothing more by order April 8, 1960.

---

77 IN THE UNITED STATES COURT OF APPEALS

Order Denying Rehearing—April 8, 1960

It Is Ordered that the petition for rehearing in the above entitled and numbered cause be, and it is hereby Denied.

78 **Clerk's Certificate to Foregoing Transcript**

(Omitted in printing)

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79 SUPREME COURT OF THE UNITED STATES

No. 70 Misc.

October Term, 1960

EMMETT HORTON, *Petitioner*,

vs.

LIBERTY MUTUAL INSURANCE COMPANY

Order Granting Motion for Leave to Proceed In Forma Pauperis and Granting Petition for Writ of Certiorari—October 10, 1960

ON PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 478.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

October 10, 1960

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PETITION NOT PRINTED

FILE COPY

No. 478

Office Supreme Court, U.S.
FILED
JUL 14 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

NO. [redacted] 1478
(Miscellaneous Docket)

EMMETT HORTON, *Petitioner*

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Respondent

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1959

NO. 1021
(Miscellaneous Docket)

EMMETT HORTON, *Petitioner*

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Respondent

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

Statement of the Nature of the Case and Result Below

Petitioner, alleging total and permanent disability resulting from an accidental injury sustained while employed by the American Bridge Division of United States Steel Corporation in Orange County, Texas, filed his claim before the Texas Industrial Accident Board claiming that respondent, the insurer for his employer, owed him $14,035.

The Board entered an award of $1,050, and Respondent duly filed suit in the United States District Court, Eastern

District of Texas, seeking to be relieved of the claimed liability of $14,035 asserted by Horton.

Jurisdiction was based upon the diversity statute (28 U.S.C., § 1332).

After suit was brought, Horton moved to dismiss, and also filed a counterclaim for $14,035 alleging total permanent disability. The counterclaim was filed "subject to" the motion to dismiss.

One week after this suit was filed, Horton also brought suit in the District Court of Orange County, Texas, against respondent for $14,035, alleging total permanent disability from the same injury.

The U. S. District Court dismissed the action on the ground that less than $10,000 was involved between the parties, and the U. S. Court of Appeals for the Fifth Circuit reversed the District Court and ordered the cause reinstated. 275 F. 2d 148.

RESPONDENT'S COUNTERPOINTS

First Counterpoint

The Court of Appeals was correct in holding that claimed liability asserted by Horton before the Industrial Accident Board fixed the amount in controversy between the parties at $14,035.

Second Counterpoint

The Court of Appeals was correct in holding that Horton invoked the jurisdiction of the U. S. District Court by filing a counterclaim seeking recovery of $14,035 in this very suit.

First Counterpoint Restated

The Court of Appeals was correct in holding that claimed liability asserted by Horton before the Industrial Accident Board fixed the amount in controversy between the parties at $14,035.

Argument and Authorities

There is no Federal law allowing Horton any recovery for the injury he claims he sustained in the accident in question. Those rights are afforded him by state law, Article 8306, et seq., *Revised Civil Statutes of Texas.* Pursuant to the state law he made his claim that respondent owed him $14,035 in workmen's compensation. Having asserted this claim before the appropriate board, that claim fixes forever the money value of the right he seeks to enforce, and the money value of liability from which respondent seeks relief.

The Supreme Court of Texas, in *Booth v. Texas Employers Ins. Assn.*, 123 S.W. 2d 322 (Tex. Comm. App., opinion adopted by the Court, 1938), interpreting the Workmen's Compensation Act of Texas, has held:

> ". . .*The suit to set aside an award of the board is in fact a suit, not an appeal.* It is filed as any other suit is filed and when filed the subject matter is withdrawn from the board. Section 5, as amended, of Article 8307, prohibits the board from proceeding further toward the adjudication of the claim after the filing of the suit. *The trial in court is de novo, wholly without reference to what may have been decided by the board.* It is true that as conditions precedent to the filing of suit the insurer or the employer must have been notified of the injury, claim must have been filed with the board, and the board must have made a final ruling and decision (Sec-

tion 4a, Article 8307), *but these requirements do not negative the fact that a suit is filed and tried, not merely an appeal taken.*" (Emphasis added.)

But by his own voluntary act, the employee fixes the money value of the right he seeks to enforce. In the *Booth v. Texas Employers*, supra, the court further holds:

> "When the claim filed with the board shows the amount claimed, in dollars and cents or by statement of facts from which the amount can definitely be determined and the award of the board is less in amount than that of the claim, *the amount shown by the claim is the amount in controversy* and the suit should be filed in the court having jurisdiction of that amount." (Emphasis added.)

This, then, is the money value of the matter in controversy between the parties. Horton made his claim for $14,035, and respondent seeks to relieve itself from such claimed liability. Horton's right to recover that sum, and respondent's effort to resist is the thing in controversy, the subject matter of the suit.

Petitioner seeks certiorari on the ground that Horton *might* not recover that much on a trial. This is true, but does not oust jurisdiction. It sometimes happens that an insurance carrier wins a lawsuit, but that does not mean that the amount of money damages sued for was not the true amount in controversy.

Here, respondent has had asserted against it a claim (made in good faith) by Horton that he is entitled to $14,035. By bringing suit, it seeks to resist that total claim, and thus relieve itself of such claimed liability. Horton set the money value by filing his claim for $14,035, respondent did not.

Petitioner argues that since Congress now forbids *removal* of these cases, that it obviously meant to prevent direct actions also. These direct suits have been the subject of Federal jurisdiction for many years, and *if* Congress desired or intended to prevent direct filing of workmen's compensation suits in the Federal Court, it could and should have inserted in 28 U.S.C., § 1445 ". . . removed to *or filed in* any district court . . ." It did not see fit to do so. The courts should not now add "or filed in" for the Congress.

Petitioner relies on the decision in *National Surety Co. v. Chamberlain,* 171 F. Supp. 591 (N. Dist. Texas 1959), in support of his contention. The *Chamberlain* case was dealt with by the Court of Appeals in a much more forceful manner than can we. But, we would point out to the court that in *Chamberlain* the employee had brought his suit first in a Texas district court, and in the Federal Court the employee did not affirmatively seek relief by way of cross action.

This court held in *Smith v. Adams,* 130 U.S. 167, 9 S. Ct. 566 (1889), 9 S. Ct. at 569:

> ". . . By a matter in dispute is meant the subject of litigation,—the matter upon which the action is brought and issue is joined, and in relation to which, if the issue be one of fact, testimony is taken. It is conceded that the pecuniary value of the matter in dispute may be determined, not only by the money judgment prayed, where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief prayed, *or by the pecuniary result to one of the parties immediately from judgment.*" (Emphasis added.)

That the money value of the right herein asserted by Horton is $14,035 should be apparent by his assertions before the Industrial Accident Board, his counterclaim in this very suit, and his subsequent suit in Orange County, Texas, (R. p. 17), for that same amount. For the District Court to dismiss for want of jurisdiction, it must appear as a legal certainty that *less* than $10,000 is involved between the parties.

St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 58 S. Ct. 586 (1938), holds, 58 S. Ct. at 289:

> *"It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."* (Emphasis added.)

Further, at p. 294, although discussing removal, it is stated:

> "The claim, whether well or ill founded in fact, fixes the right of the defendant to remove, and the plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election. *If he does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount*, and though he would be justly entitled to more, the defendant cannot remove." (Emphasis added.)

The same rationale applies here; if Horton truly did not desire to place the sum of $14,035 in controversy between himself and respondent, he could have *claimed* less before the Board.

Aetna Casualty & Surety Company v. Flowers, 330 U.S. 464; 67 S. Ct. 798 (1947), arising under the Tennessee Workmen's Compensation law, presented the question of

jurisdictional amount. There, a Tennessee court had awarded compensation in installments, the total of which were above the jurisdictional minimum but the amount of those due at the time of suit was less. On removal by the insurer, the employee-claimant resisted on the grounds that the amount in controversy was the amount of payments then due since that was the only pecuniary certainty between the parties, and any future payments were uncertain and conjectural. The court rejected this view, stating, 330 U.S. 464, at 467-8:

> "If this case were one where judgment could be entered only for the installments due at the commencement of the suit . . . future installments could not be considered in determining whether the jurisdictional amount was involved, even though the judgment would be determinative of liability for future installments as they accrued . . . But this is not that type of case. For the Tennessee *statute which creates liability for the award contemplates a single action for the determination of claimant's right to benefits and a single judgment for the award granted . . . Nor does the fact that it cannot be known as a matter of absolute certainty that the amount which may ultimately be paid, if respondent prevails, will exceed $3,000, mean that the jurisdictional amount is lacking. This Court has rejected such a restrictive interpretation of the statute creating diversity jurisdiction.*" (Emphasis added.)

The similarity of the *Flowers* case to the case at bar is striking. In both, it is the claimed liability of the insurer as asserted by the employee that fixes the money value of the right sought to be enforced.

Very closely related to this case are the cases where suit is brought by an insurer seeking to avoid some claimed liability upon an insurance policy. In *Hartford Accident & Indemnity Co. v. Northwest National Bank*, 228 F. 2d 391 (7th Cir. 1955), the insurer sought to cancel the policy although only $405.00 was then claimed. In passing on the jurisdictional amount, the court states, 228 F. 2d 391, 402:

> "There remains to be considered the contention of the Bank that the suit as to it should have been dismissed for lack of jurisdiction on the ground that the requisite amount was not involved. This contention is based upon the Bank's theory that there was nothing in dispute between plaintiffs and it other than the sum of $405.00, which the Bank had received from the plaintiff Hartford Fire Insurance Company in payment of damages to the car . . . which by the judgment under attack the Bank was required to pay to the insurer. We think this is a misconception of the situation . . . The amount in controversy was *the value of the policy in suit, or,* perhaps more accurately stated, *the amount of the liability which plaintiffs were called upon to assume,* and not merely the amount in dispute between the plaintiffs and the Bank." (Emphasis added.)

A similar holding is found in the case of *Aetna Casualty & Surety Co. v. Yeatts*, 99 F. 2d 665 (4th Cir. 1938).

In *General Accident Fire & Life Assurance Corporation v. Mostert*, 131 F. 2d, 596 (5th Cir. 1942), it was stated:

> "It is conceded that under the Texas Compensation Law, Vernon's Annotated Civil Statutes of Texas, Art. 8306, a suit to set aside an award opens up for trial

de novo the claim filed with the Board; and we assume, as the parties do, that the amount here in controversy *is the largest amount that could be recovered under the claim.*" (Emphasis added.)

Petitioner quotes statistics from Senate Report No. 1830, 85th Congress, Second Session, 7, 8 (1958), showing that there were 2147 workmen's compensation cases filed in Texas in 1957. Petitioner state 1146 removed cases, and then *assumes* the remainder were all filed as direct actions by the insurer. However, such report is silent as to how many were filed as direct actions by employees. Obviously, a great number are filed by employees, as is their right. Congress has not seen fit to stop workmen's compensation suits from being filed directly in Federal Courts, and as long as such jurisdiction exists, it should be honored.

Second Counterpoint Restated

The Court of Appeals was correct in holding that Horton invoked the jurisdiction of the U. S. District Court by filing a counterclaim seeking recovery of $14,035 in this very suit.

Argument and Authorities

Petitioner filed a counterclaim in this suit, saying it was "subject to" his motion to dismiss.

Rule 12, Federal Rules of Civil Procedure, allows certain *defenses* to be asserted "subject to" any other *defense*. It is submitted that the Rules do not permit affirmative counterclaims to be filed "subject to" a motion to dismiss.

The long established rule has been that where, as in this case, the jurisdictional amount is in question, and

a counterclaim is brought in an amount which *in itself*, or added to the amount claimed in the complaint, adds up in excess of the minimum jurisdictional amount, jurisdiction is established whatever may be the state of the plaintiff's complaint. *Home Life Insurance Co. v. Sipp*, 11 F. 2d 474 (3rd Cir., 1926); *Roberts Min. and Mill Co. v. Schrader*, 95 F. 2d 522 (9th Cir., 1938). See also, *Isenberg v. Biddle*, 125 F. 2d 741 (D.C. Cir., 1941); *Switzer Brothers v. Chicago Cardboard Co.*, 252 F. 2d 407 (7th Cir., 1958).

Petitioner has cited no authority showing that a counterclaim of $14,035 can be asserted "subject to" a motion to dismiss for want of jurisdictional amount. Of course, petitioner was not required to counterclaim for $14,035; he could have sued for $9,900 if he desired.

Conclusion

The matter in controversy and the issue here litigated is the right of respondent to be free from the claimed liability asserted against it by petitioner Horton. By his own action he valued that right at more than $10,000 before the Industrial Accident Board, before the United States District Court by counterclaim and by a separate, distinct suit in the state court.

The right he seeks to enforce is given him by Texas, not Federal law. The Supreme Court of Texas, and the Court of Appeals many times have held the money value of that right and the money value of the claimed liability of the insurer is the amount sought by the employee before the

Industrial Accident Board. The decision below was correct, the petition for certiorari should be denied.

Respectfully submitted,

MAJOR T. BELL
HOWELL COBB
First Federal Savings Building
Beaumont, Texas

By _____
Counsel for Respondent

This is to certify that a true copy of the foregoing Reply to Petition for Writ of Certiorari has been served on Petitioner's counsel, Joe H. Tonahill, P. O. Box 179, Jasper, Texas, and William VanDercreek, 3315 Daniels, Dallas 5, Texas, by depositing the same in the United States Mail with first class postage prepaid properly addressed.

_____
MAJOR T. BELL

FILE COPY

Office Supreme Court, U.S.
FILED
JAN 7 1961
JAMES R. BROWNING, Clerk

PETITION NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 178

EMMETT HORTON,

Petitioner,

vs.

LIBERTY MUTUAL INSURANCE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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December, 1960

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 478

EMMETT HORTON,

Petitioner,

vs.

LIBERTY MUTUAL INSURANCE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The District Court's Memorandum Decision (Record, pp. 36-38) is not reported. The opinion of the Court of Appeals for the Fifth Circuit (Record, pp. 40-48) is reported at 275 F.2d 148.

Jurisdiction

The judgment of the Court of Appeals was entered February 22, 1960 (Record, p. 48). A petition for rehearing

was timely filed on March 14, 1960, and was denied on April 8, 1960 (Record, p. 48). The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari were filed May 16, 1960, and granted by order of this Court on October 10, 1960 (Record, p. 49). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. The first question presented is whether in a diversity action to set aside a state workmen's compensation award the federal jurisdictional amount must be determined and controlled by state law instead of federal law.

2. The second question presented is whether the jurisdictional amount is present in a diversity action brought by Respondent-insurer to set aside state workmen's compensation board's award of only $1,050.00 in favor of Petitioner-employee.

3. The third question possibly presented is whether the jurisdictional amount is present in a diversity action where plaintiff's claim is below the jurisdictional amount because the defendant, expressly subject to a prior motion to dismiss for want of jurisdiction, conditionally files a compulsory counterclaim in excess of the jurisdictional amount.

4. The fourth question presented is whether an appeal by an insurer from a Texas Industrial Accident Board's award in favor of an injured employee constitutes an original action within the federal district court's jurisdiction.

Statutes Involved

28 U.S.C. §1332 (in relevant part):

"§1332. Diversity of Citizenship; amount in controversy; costs.

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and is between . . ."

"(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

28 U.S.C. §1445 (in relevant part):

"§1445. Non removable actions

* * * * * *

"(c) A civil action in any State court arising under the workmen's compensation laws of such state may not be removed to any district court of the United States."

Federal Rule Civil Procedure 12(b) (in relevant part):

"(b) How Presented. . . . No defense or objection is waived by being joinded with one or more other defenses or objections in a responsive pleading or motion."

Texas Civil Statutes (Vernon, 1948, Supp. 1958):

Art. 8307, 8307a, 8307b (set out in relevant part, Appendix, pp. 11a-17a).

Statement

Respondent compensation insurer brought this suit in the United States District Court for the Eastern District of Texas praying that an $1,050.00 award entered in favor of the Petitioner by the Texas Industrial Accident Board be set aside (Record, pp. 1-4). Jurisdiction was claimed under diversity of citizenship and amount in controversy. 28 U.S.C. §1332. Petitioner, an injured employee of an employer covered by the Texas workmen's compensation law, had filed a claim before the Industrial Accident Board for the maximum compensation allowable under the Texas Act ($35.00 a week for 401 weeks—$14,035.00). This proceeding culminated in the $1,050.00 award.[1]

Petitioner moved to dismiss Respondent's suit to set aside the $1,050.00 award for want of jurisdictional amount; and then, expressly subject to the motion to dismiss, filed a compulsory counterclaim seeking the maximum compensation (Record, pp. 5, 11, 14). The district court in its memorandum opinion approved the extensive discussion of the identical problem in *National Surety Corp.* v. *Chamberlain*, 171 F.Supp. 591 (N.D. Tex. 1959), and dismissed the plaintiff-respondent's claim for want of federal jurisdiction; and noting that the counterclaim had been expressly conditioned on the motion to dismiss, ordered the entire suit dismissed (Record, pp. 36-38). On appeal the Fifth Circuit reversed and remanded, holding the matter

[1] The Respondent-insurer's previous compromise settlement agreement of $230.00 was set aside for *fraud*. *Emmett Horton* v. *Liberty Mutual Insurance Company*, No. 11,986, in the District Court of Orange County, Texas (1959), (Record p. 35).

in controversy was the amount claimed by the employee before the compensation board and not the amount of the award ($1,050.00) plaintiff-respondent sought to set aside by this suit. The court held that in workmen's compensation cases Texas law controls the determination of the amount in controversy for the federal district court. The court, without mentioning that the counterclaim in this case was filed subject to the motion to dismiss, further stated that jurisdictional amount can be satisfied by filing a compulsory counterclaim in excess of the minimum amount. The court also held that this suit by the insurer to set aside the administrative award constituted an original civil action (Record, pp. 40-48).

Summary of Argument

The decision below should be reversed because it is directly contrary to the intent of Congress to limit federal diversity jurisdiction by increasing the jurisdictional amount (Sen. Rep. No. 1830, 85th Cong., 2d Sess. 3, 10, 14, 21, 26-27 (1958)); and indirectly contrary to the intent of Congress to give the employee the conclusive choice of forums by prohibiting the removal of workmen's compensation cases (Sen. Rep. No. 1830, 85th Cong., 2d Sess. 9 (1958)). This incorrect result was reached by applying state law instead of federal law in determining the amount in controversy under 28 U.S.C. §1332. Indisputably federal law must be applied. *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100.

Not only is the state test for determining jurisdictional amount contrary to the federal test, but also the very reasons which underlie the state test are contrary to the reasons which underlie the federal test.

Under the federal test the amount in controversy is determined from the plaintiff's cause of action, which in

this case is the right to set aside a $1,050.00 award. *Vance* v. *W. A. Vandercook Co.*, No. 2, 170 U.S 468; *Elgin* v. *Marshall*, 106 U.S. 578; *St. Paul Mercury Indem.* v. *Red Cab Co.*, 303 U.S. 283.

Under the state test, in an action by a compensation-insurer, the amount in controversy is not keyed to the plaintiff-insurer's cause of action to set aside the award. Instead the amount in controversy is keyed to the maximum potential claim that could be asserted by the employee-defendant—the amount the employee claimed before the Board. *Booth* v. *Texas Employers' Ins. Ass'n*, 132 Tex. 237, 251, 123 S.W.2d 322, 330.

Federal courts are courts of limited jurisdiction. The purpose of the federal jurisdictional amount is to further reduce the number of cases which can be brought in the national courts. State courts are courts of general jurisdiction. The purpose of the Texas jurisdictional amount requirement is to allocate cases among the three sets of trial courts.

The result of the decision below will be to erroneously place upon the already overcrowded dockets of the federal courts in Texas approximately 1100 diversity cases a year which, under the federal test, involve less than $10,000.

Petitioner's counterclaim may not be used to satisfy the jurisdictional amount requirement because it was filed expressly subject to a motion to dismiss Respondent's suit. Federal Rule of Civil Procedure 12b; 1 Moore's Federal Practice, ¶0.93 [5. -3], 859-60 (2d ed. 1960).

Moreover, if this suit is to review the amount Petitioner-employee claimed before the Board, and thus is not an independent and original civil action, federal jurisdiction fails. Federal district courts have no appellate-administrative jurisdiction. *Chicago R.I. & P. RR. Co.* v. *Stude*, 346 U.S. 574.

ARGUMENT

I.

In Diversity Action To Set Aside State Workmen's Compensation Award Federal Law Must Be Applied In Determining Whether Federal Jurisdiction Exists.

Federal jurisdiction of this suit to set aside the Texas Industrial Accident Board's $1,050.00 award is predicated upon diversity jurisdiction. The Questions Presented concern two of the requisites required under 28 U.S.C. §1332; that the *amount in controversy* must exceed $10,000, exclusive of interest and costs, and that the suit must be an *original civil action.*

Applying federal law the district court dismissed the present case for want of federal jurisdiction (Record, pp. 36-38). The Fifth Circuit reversed, holding that *state* law controls in determining the *federal* jurisdictional amount in Texas workmen's compensation suits. The court stated:

> "On motion by Horton to dismiss the suit for want of jurisdiction, the district judge turned his face away from the controlling decision of the Texas Supreme Court and from the many decisions of this court, declaring that Federal Court Jurisdiction in Texas Workmen's Compensation suits is a special jurisdiction and, in exercising it, the court is bound by, and must strictly follow, the construction placed on the statutes by the state courts (Record, p. 41).
>
> ". . . after the Supreme Court of Texas had in 1938, in the Booth case, dealt specifically, completely, and authoritatively with the matter of trial court jurisdiction of suits to set aside orders of the Board, this

court . . . declared and followed the rule for determining jurisdiction laid down by the Supreme Court of Texas in the Booth case" (Record, p. 44).

With deference to the court below, federal law, not state law, is to be used in determining the meaning of a federal jurisdictional statute. This very point was before this Court in *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 104: "The removal statute which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied." Accord: *Chicago R.I. & P. RR. Co.* v. *Stude*, 346 U.S. 574, 580 (in diversity action federal law governs application and meaning of jurisdictional statute). As Mr. Justice Reed observed in his dissenting opinion in *Angel* v. *Bullington*, 330 U.S. 183, 198: "In matters of procedure and jurisdiction, I take it, no one would contend that the doctrine of Erie Railroad is applicable. One may regret that the line of the Great Divide between substance and procedure cannot be clearly marked so that all may agree as to its location in any one case. But that line exists." There should be no difficulty in drawing the line in this case.

There are perhaps few propositions as well established as the rule under present discussion. Federal law must determine questions of federal jurisdiction because such jurisdiction depends upon federal statutes and the Federal Constitution. We are not here concerned with the application of substantive rights created under the state remedy, but rather with the more fundamental question of whether Congress has given the federal district court jurisdiction to adjudicate this state-created remedy.

The basic error of the Fifth Circuit was to rely upon the Texas decision in *Booth* v. *Texas Employers' Insurance Association*, 132 Tex. 237, 123 S.W.2d 322 (1938), in de-

termining the amount in controversy for purposes of 28 U.S.C. §1332. This error pervades the rationale of the entire decision below, as is reflected by the stinging rebuke administered to the trial judge for "turn[ing] his face away from the controlling decisions of the Texas Supreme Court" (Record, p. 41).

In the paragraphs that follow Petitioner points out the difference between the state rule and the federal rule; and also the difference in the underlying principles of the two rules.

II.

Congressional Intent In Increasing The Jurisdictional Amount And In Prohibiting Removal Is Expressly Opposed To Exercising Federal Jurisdiction In This Case.

a. *Jurisdictional Amount*

As this Court well knows, federal district court jurisdiction is derived from Article III of the Constitution, but since Article III is not self-executing there is no jurisdiction save what Congress has chosen to allow. *Cary* v. *Curtiss*, 3 How. 236, 245; see Sen. Rep. No. 1830, 85th Cong., 2d Sess. 35 (1958), (Appendix, pp. 2a-3a). And traditionally this Court has narrowly construed the statutory grant of federal jurisdiction. *Healy* v. *Ratta*, 292 U.S. 263, 270: "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." In the great case of *Strawbridge* v. *Curtiss*, 3 Cranch 267, this Court held that perfect diversity instead of minimal diversity was required under the diversity statute.

Now consider the relationship between the purpose for jurisdictional amount in federal courts and the purpose

in state courts. Article III contains no mention of jurisdictional amount; the amount requirement was added by Congress to limit federal jurisdiction and for this very purpose Congress in 1958 raised the amount required from $3,000 plus to $10,000 plus. 28 U.S.C. 1332, Act of July 25, 1958, Pub. L. 85-554, §2, 72 Stat. 415; see Sen. Rep. No. 1830, 85th Cong., 2d Sess. 3-4, 14-15, 21-24 (1958). Contrawise state courts, which are vested with general jurisdiction, employ the jurisdiction amount device to allocate cases among the various categories of state trial courts. This is well illustrated by the Texas decision that the court below relied upon, *Booth* v. *Texas Employers' Insurance Association*, 132 Tex. 237, 123 S.W.2d 322 (1938) (for purpose of Texas jurisdictional statute the amount in controversy in *insurer's* suit to set aside the Industrial Accident Board's award is the amount claimed by the employee before the Board and not the amount of the Board's award).

The reasons which underlie the *Booth* decision are not applicable to the federal jurisdictional statute. Texas has three trial courts: Justice of the Peace, with maximum jurisdictional amount of $200 (six-man jury determines the law and fact—appeals *de novo* to county court); County Courts with minimum jurisdictional amount of $200 and maximum of $1,000 (six-man jury); District Courts with minimum jurisdictional amount of $500 and no maximum amount (twelve-man jury). If the Texas courts in actions brought by compensation-insurers had not adopted a test based upon the maximum amount of the defendant's potential counterclaim, two suits in two courts could result. To illustrate: assume employee claimed $3,000 before the Board and the Board awarded $400. If the insurer's action was brought in the County Court and the defendant-employee wished to counterclaim for more than $1,000, the employee would have to instigate a separate suit in the State District Court. *Booth* v. *Texas Employers' Insurance*

Association, 132 Tex. 237, 251, 123 S.W.2d 322, 330 (1938). Under this Texas case if the employee-defendant does not wish to claim more than the Board's award, he need not counterclaim at all. Thus, it is of considerable significance that the amount claimed before the Board *only* applies in suits brought by the *insurer*. If the employee brings an action to set aside the Board's award and to recover compensation, the amount in controversy is governed by the amount claimed in his court petition—not the amount he claimed before the Board. For, although the employee may not claim more in court than he did before the Board, he can claim less. *Booth* v. *Texas Employers' Insurance Association*, 132 Tex. 237, 246, 123 S.W.2d 322, 327-8 (1958) (on above point the opinion below, Record, p. 43, misstates *Booth*).

The Texas rule is based on principles of sound judicial administration in allocation of cases among the trial courts. In the federal system, where jurisdictional amount is used to restrict federal jurisdiction, the principles of sound judicial administration require a different result. Even the cost penalty provision of 28 U.S.C. §1332(b), set out page 3, *supra*, would be of doubtful application to the workmen's compensation suits brought by the insurer. See *National Surety Corp.* v. *Chamberlain*, 171 F. Supp. 591, 594 (N.D. Tex. 1959).

b. *Workmen's Compensation*

Along with increasing the jurisdictional amount Congress in 1958 prohibited the removal of state workmen's compensation suits (28 U.S.C. §1445(c), Act of July 25, 1958, Pub. L. 85-554, §5, 72 Stat. 415). This provision carried out the general purpose to limit federal jurisdiction and to ease what is perhaps the number one problem facing our federal court system; delay due to congestion of the trial dockets. Over 1000 workmen's compensation cases a year were being removed from Texas courts to federal district courts. Sen. Rep. No. 1830, 85th Cong., 2d Sess. 8

(1958) (Appendix, p. 5a). This problem of federal jurisdiction over workmen's compensation suits also exists in other states (*Id.*, at 34, Appendix, p. 10a).

Besides court congestion, Congress was also concerned with the unfairness to the injured employees that results from the suits being tried in federal courts. Under the Texas law the venue on an appeal from the Board's award would be in the county where the injury occurred, normally near the residence of the employee. Because of the geographical size of Texas and the considerable distance between division points of the four federal district courts of Texas, the place of trial in the federal court may be a considerable distance from the employee's home. Tactically the injured employee is severely handicapped in presenting his claim to a federal court in a distant town, not only because of the added expense of counsel, but also because of the difficulty and expense of securing the attendance of expert medical witnesses. In addition the federal court docket in some of the districts in Texas is a year or more behind the state docket. The exercise of federal jurisdiction means that many injured employees will have to settle their claims for substantially less than their value would be in a state court judicial proceeding. Congress was aware of this in its statement:

> "Nearly all of the state statutes on workmen's compensation provide summary proceedings for the expeditions [sic] and inexpensive settlement of claims by injured workmen against the employer. The procedure provided in such state statutes is not, as a rule, applicable to procedure in Federal courts. When cases are removed to Federal court the State statutes, in many instances, are entirely nullified. For instance, some of these State statutes limit the venue to the place where the accident occurred or to the district of the work-

> man's residence. When removed to the Federal court the venue provisions of the State statute cannot be applied. Very often cases removed to the Federal courts require the workman to travel long distances and to bring his witnesses at great expense. This places an undue burden upon the workman and very often the workman settles his claim because he cannot afford the luxury of a trial in Federal court." Sen. Rep. No. 1830, 85th Cong., 2d Sess. 8-9 (1958).

The "luxury of a trial in Federal court" is specially significant when one considers the small settlements and judgments that result. In the Eastern District of Texas, where this case arose, in only 3 cases out of 815 disposed cases for the period July 1, 1956 to March 7, 1960, was the employee's recovery over $10,000. Of these 815 cases, in 755 cases the recovery was between $5,000 and $18.95; 567 cases between $3,000 and $18.95; and 190 cases between $1,000 and $18.95.[2]

The insurance companies are not blind to the effect of a trial in the federal court. And now, instead of removing, the insurance company merely outraces the injured employee to the courthouse door. In this case, the insurer gave notice of appeal and filed this suit the same day the Board's award was announced, April 30, 1959. Subsequently, on May 6, 1959, Petitioner filed his appeal from the compensation award in the State District Court in Orange County (Record, pp. 27-30). And although two in personam suits can proceed concurrently as noted by the court below (Record, p. 46, n. 4), the Respondent has filed a plea in abatement in the Petitioner's state court action asking that it be

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[2] Data taken from "List of Workmen's Compensation Cases for Period July 1, 1956 through March 7, 1960." Report of Clerk, United States District Court for the Eastern District of Texas. Report is on file in the Clerk's Office, Tyler, Texas.

abated and dismissed. The plea in abatement is based upon the prior filing of Respondent's federal suit. (Plea is set out, Appendix, pp. 18a-20a).

Congress by prohibiting removal effectively closed the back door to the federal courthouse; the Fifth Circuit by manipulating the amount in controversy has opened the front door.

Without this manipulation practically every one of these suits by the *insurer* could *not* be brought in the federal court. By applying the federal test as to jurisdictional amount to suits brought by the insurer, thus limiting the amount in controversy to the amount of the award (all that is invoked by the insurer's cause of action) this result will be achieved. The maximum award under the Texas compensation law is $14,035.00 (401 weeks at $35.00 a week). In the vast majority of instances, the Industrial Accident Board's award is substantially below $10,000. The average award for the years 1957-1959 is less than $1,000.[3] Thus, under the decision below, the insurer circumvents the removal prohibition by racing into the federal court with the jurisdictional amount based not upon his cause of action

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[3] Report of the Industrial Accident Board of Texas for the Fiscal Year Ending August 31, 1957:

Number of Claims Handled—63,934
Number of Awards Issued—8,467
Amount of Board's Awards—$6,590,438.01
Notices of All Cases Disposed of in Court—4,996

Id. for the Fiscal Year Ending August 31, 1958:

Number of Claims Handled—60,755
Number of Awards Issued—8,192
Amount of Board's Awards—$7,407,287.32
Notices of All Cases Disposed of in Court—5,112

Id. for the Fiscal Year Ending August 31, 1959:

Number of Claims Handled—60,060
Number of Awards Issued—7,888
Amount of Board's Awards—$6,898,025.82
Notices of All Cases Disposed of in Court—4,620

(as required by the federal test) but upon the unasserted potential counterclaim of the employee (as permitted under the state test).

Respondent has contended that if Congress had not intended federal courts to take jurisdiction of the instant suit it would have prohibited original jurisdiction as well as removal jurisdiction over workmen's compensation suits. With deference, this argument is fallacious. Congress as a matter of policy expressly decided that the *employee* should have a *choice* of a state forum or a federal forum and that the employee's choice of a state forum was not to be defeated through removal.

> "Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws which are similar to the workmen's compensation acts of the States. In the Jones Act, the Fair Labor Standards Act, and the Railway Employers' Liability Act, all of which are in the nature of workmen's compensation cases, the Congress has given the workman the option of filing his case in either the State court or the Federal court. If filed in the State courts the law prohibits removal to the Federal court. This proposed legislation accomplishes this same purpose and grants the same privilege to workmen who are entitled to compensation under the State workmen's compensation act —that is, the workman has the option to file his case in either the Federal or the State court. If he files in the State court it is not removable to the Federal court." Sen. Rep. No. 1830, 85th Cong., 2nd Sess. 9 (1958).

III.

Federal Jurisdictional Amount Is Not Presented by Respondent-Insurer's Suit to Set Aside Administrative Board's $1,050.00 Award.

a. *Amount in controversy governed by plaintiff's cause of action*

The Respondent-insurer brought this action to set aside the $1,050.00 Industrial Accident Board's award in favor of Petitioner. Jurisdictional amount is claimed because the Petitioner-employee sought $14,035.00 before the Board. Consider the relationship between the Board's award and the amount the employee claimed before the Board. If the insurer appeals, the employee may counterclaim for any amount up to the sum claimed before the Board. If the insurer appeals and the employee does not present a claim before the court, the Board's award is set aside. If neither party appeals, the Board's award becomes final and binding upon the insurer and the employee. Texas Civil Statutes (Vernon, 1948, Supp. 1958) Art. 8307, §5 (Appendix, p. 13a); *Booth* v. *Texas Employers' Insurance Association*, 132 Tex. 237, 123 S.W.2d 330 (1938) (see discussion of case under heading IIa, *supra*). The instant suit by Respondent-insurer *is not* to obtain a declaratory judgment that insurer is not obligated to pay $14,035.00; and certainly the suit *is not* to obtain installment payments as was involved in *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U.S. 464. The Respondent-insurer's cause of action *is* to set aside the $1,050.00 award; nothing more. It is the Petitioner-employee who was injured and who has the right to seek compensation. The insurer's right is to set aside the Board's award.

Petitioner's basic position is that the amount in controversy under 28 U.S.C. §1332 is to be determined from the claim for relief, *i.e.*, the cause of action, asserted by plaintiff's (Respondent's) complaint.[4] This proposition is both fully in accord with the amount requirement purpose to limit federal jurisdiction and with the decisions of this Court. As early as 1798 this Court, in *Wilson* v. *Daniel*, 3 Dall. 401, 407-8, stated (per Ellsworth, C.J.):

> "It was not intended to say, that on every such question of jurisdiction, the demand of the plaintiff is alone to be regarded; but that the value of the thing put in demand furnished the rule. The nature of the case must certainly guide the judgment of the court; and whenever the law makes a rule, that rule must be pursued. Thus, in an action of debt on a bond for 100£, the principal and interest are put in demand, and the plaintiff can recover no more, though he may lay his damages at 10,000£. The form of the action, therefore, gives in that case the legal rule. But in an action of trespass, or assault and battery, where the law prescribes no limitation as to the amount to be recovered, and the plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put in demand, and presents the only criterion, to which, from the nature of the action, we can resort in settling the question of jurisdiction.
>
> "The proposition then is simply this: Where the law gives no rule, the demand of the plaintiff must furnish one; but where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded."

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[4] By analogy, compare the rule that a federal question must appear in the complaint well pleaded and not by anticipation of defendant's answer. *Louisville & Nashville Railroad* v. *Mottley*, 211 U.S. 149.

This aspect of the *Wilson* case was cited with approval in *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 182. In *Vance* v. *W. A. Vandercook Co.* (No. 2), 170 U.S. 468, 481, this Court again held that the amount in controversy was that, and only that, asserted under the plaintiff's cause of action. Accord: *Glenwood Light & Water Co.* v. *Mutual Light, Heat & Power Co.*, 239 U.S. 121. See Dobie on Federal Jurisdiction and Procedure, §56 (1928).

Here, for a cause of action Respondent alleges that the Petitioner is not entitled to $1,050.00.[5] But, for the amount in controversy Respondent (plaintiff) relies not upon his asserted cause of action to set aside the award. As previously discussed in reference to *Booth* v. *Texas Employers' Ins. Ass'n*, 132 Tex. 237, 123 S.W.2d 322 (1938), the Respondent relies upon the maximum potential counterclaim that *could* be asserted by the Petitioner.[6] The Fifth Circuit

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[5] "Plaintiff would further show that said order, and award of the Industrial Accident Board of the State of Texas, above described made and entered on April 30, 1959, in this claim and the claim itself of the defendant herein is wholly unsupported by evidence or law and should be in all things vacated, set aside and held for naught." Respondent's Complaint, paragraph 6. Record p. 3.

"Wherefore, premises considered, plaintiff prays that defendant be cited to appear and answer this complaint and that upon final hearing hereof said award be in all things vacated, set aside, voided and declared to be of no further force and effect, plaintiff further prays that defendant herein take nothing of and from this plaintiff and that plaintiff recover its costs and be given such other and further relief as it may be justly entitled to receive." Respondent's Complaint, paragraph 8, Record p. 4.

[6] "The amount in controversy as claimed by defendant and which defendant claimed and claims before the Industrial Accident Board is in excess of the sum of Ten Thousand Dollars ($10,000) exclusive of interest and costs, said defendant before the Industrial Accident Board claiming to have been totally and permanently injured in said above described accident in the course and scope of his employment, which if true, would be a sum equal to Fourteen Thousand Thirty-five Dollars ($14,035.00)." Respondent's Complaint, paragraph 4, Record p. 3.

erred in determining jurisdictional amount by taking the defendant's viewpoint in the prior administrative hearing that culminated in the $1,050.00 award instead of the plaintiff's viewpoint in this case.

One of the leading cases involving jurisdictional amount is *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283. This case warrants special consideration because the Fifth Circuit and Respondent, on one hand, believe the case supports the Fifth Circuit's holding; however the district court below, the district court in *National Surety Corp.* v. *Chamberlain,* 171 F. Supp. 591 (N.D. Tex. 1959), and the Petitioner, on the other hand, believe the case supports the district court's holding. The difficulty comes in applying the "legal certainty" phrase of the *St. Paul* case which is applicable when the plaintiff's claim is for *unliquidated damages.* The phrase does not refer to the possibility that a suit may involve the jurisdictional amount because of the defendant's answer for the *St. Paul* case requires that the amount in controversy be based upon the plaintiff's claim:

> "In a cause instituted in the federal court the plaintiff chooses his forum. He knows or should know whether his claim is within the statutory requirement as to amount. His good faith in choosing the federal forum is open to challenge not only by resort to the face of his complaint, but by the facts disclosed at trial, and if from either source it is clear that his claim never could have amounted to the sum necessary to give jurisdiction there is no injustice in dismissing the suit. Indeed, this is the court's duty under the Act of 1875." *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 290.

It is respectfully submitted that the able opinion in *National Surety Corp.* v. *Chamberlain,* which involves an

identical fact situation, reaches the correct result. Professor Moore states: "With deference, we feel that analysis of the Court of Appeals in *Horton* was unsound, and that the proper ruling was that of the district court in *Chamberlain*." 1 Moore's Federal Practice, paragraph 0.93 [5.-3], p. 859 (2d ed. 1960). See also 1 Moore's Federal Practice 511 (1938); Forrester, Cases and Materials on Federal Jurisdiction and Procedure 214 (1950).

b. *Collateral and anticipated effect of Respondent-insurer's cause of action to set aside $1,050.00 award may not be considered.*

This principle is a corollary of the rule previously discussed that the amount in controversy must be determined from the plaintiff's cause of action and not from a different cause of action possessed by the defendant. The instant suit to set aside a $1,050.00 award was held to involve the amount in controversy only by considering the suit's collateral and anticipated effect. (See paragraph 4 of Respondent's complaint, Record, p. 3, quoted N. 6, *supra*.) As discussed previously, the reason for saying that the amount in controversy exists in this suit is based upon two factors: (1) if the employee does not come and seek to uphold the award, it will be set aside; (2) if the employee does seek more than the amount of the award, the most he can counterclaim for is the amount he sought before the Board. (See *Booth* v. *Texas Employers Ins. Ass'n*, 132 Tex. 237, 123 S.W.2d 322 (1938); Texas Civil Statutes (Vernon, 1948, Supp. 1958), Art. 8307 Sec. 5, Appendix, pp. 13a-15a).

If the Fifth Circuit's view be the rule, the plaintiff with a claim below the jurisdictional amount could always come into federal court so long as a potential compulsory counterclaim existed that *could* involve more than the jurisdictional amount. A plaintiff should not be able to add the value of these potential counterclaims simply because the principle

of *res judicata* would bar defendant from later asserting them if they are not raised in the instant suit. To hold as the court below is to give consideration to the collateral effect of the potential judgment, violating one of the cardinal rules applicable to the computation of the amount in controversy. *Elgin* v. *Marshall*, 106 U.S. 578 (effect of *res judicata* may not be considered in determining jurisdictional amount); *Healy* v. *Ratta*, 292 U.S. 263 (object of the suit does not embrace matter collateral or incidental to issue raised by pleading). Judge Dobie stated the rule as follows:

> "The amount in controversy in the United States District Court is always to be determined by the value to the plaintiff of the rights which he in good faith asserts in his pleading that sets forth operative facts which constitute his cause of action. A counterclaim should play no part in the determination of the amount in controversy. And only the value of right directly in issue in the suit in question, not the collateral effect of the judgment can be considered in making up the necessary jurisdictional amount." Dobie on Federal Jurisdiction and Procedure, §56 (1928).

IV.

Jurisdictional Amount Is Not Satisfied Where Plaintiff's Claim Is Below The Jurisdictional Amount Because Defendant, Expressly Subject To A Prior Motion To Dismiss For Want Of Jurisdiction, Conditionally Files A Compulsory Counterclaim In Excess Of The Jurisdictional Amount.

Although the court below stated that another reason for not refusing jurisdiction was that the jurisdictional amount is satisfied when a compulsory counterclaim is brought in an amount in excess of the jurisdictional minimum, it is not entirely clear that this is an alternative holding. For

the Fifth Circuit opinion, written by a learned judge of great experience, never once mentions the salient fact that the counterclaim in this case was filed expressly subject to the motion to dismiss[7] and so treated by the district court[8] (and so argued by Petitioner in his brief and in his oral argument to the court below). And the authority cited by the Fifth Circuit does not appear to be applicable to this case where the claim was filed subject to the motion to dismiss.[9]

Federal Rule of Civil Procedure 12(b) states: "No defense or obligation is waived by being joined with one or more other defenses or objections in a responsive pleading or motion."[10] Moreover it is not uncommon for prudent counsel to file a compulsory counterclaim subject to a

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[7] Defendant's [Petitioner's] Cross-Complaint paragraph 1, Record p. 14: ". . . cross-plaintiff files this his cross-action [counterclaim] subject to his motion to dismiss and without waiving same."

[8] District Court's Memorandum Decision, Record p. 38: "Since Defendant's' [Petitioner's] cross-claim was filed subject to his motion to dismiss Defendant's cross-claim will likewise be dismissed."

[9] *Home Life Insurance Co.* v. *Sipp*, 11 F. 2d 474 (3rd Cir. 1926) (was reversed for want of jurisdictional amount); *Roberts Min. & Mdl. Co.* v. *Schrader*, 95 F. 2d 522, 523 (9th Cir., 1938) ("Schrader took no advantage of this jurisdictional defect, but filed an answer . . ."); *Henderson* v. *Maryland*, 62 F. 2d 107 (5th Cir. 1933) (amendment by plaintiff to claim $3,661.20 waived any error in denial of remand of previous $2,916 claim; court found $2,916 claim asserted to prevent removal); *Isenberg* v. *Biddle*, 125 F. 2d 741 (D.C. Cir., 1941) (defendant, U.S. Attorney-General, *wanted* to litigate counterclaim in federal court and independent federal jurisdiction existed over counterclaim); *Switzer Bros.* v. *Chicago Cardboard Co.*, 252 F. 2d 407 (7th Cir., 1958) (does not involve jurisdictional amount).

[10] See *In re Mount Forest Fur Farms of America, Inc.*, 122 F. 2d 232, 245 (6th Cir. 1941); *Diaz-Montero* v. *Brownell*, 217 F. 2d 737, 738 (9th Cir. 1954); *W. H. Elliott & Sons Co.* v. *Nuodex Products Co.*, 243 F. 2d 116, 118-119 (1st Cir. 1957). *But Cf. Hook & Ackerman* v. *Hirsh*, 98 F. Supp. 477, 478 (D.D.C. 1951). In general see 2 Moore's Federal Practice, paragraph 12.12 (2d ed. 1948).

prior motion to dismiss. In the condemnation case of *Chicago R.I. & P. RR.* v. *Stude*, 346 U.S. 574, the railroad-condemnor brought suit in federal district court asking that the damages be affixed at not more than $10,000 instead of the $23,888.60 awarded by the Commissioners. The defendant landowner filed, subject to his motion to dismiss, a compulsory counterclaim asking damages for $32,000. *Chicago R.I. & P. RR.* v. *Stude*, October Term 1953, No. 209, Transcript of Record, p. 12, Brief of Petitioner, p. 6 (*Stude* case is discussed p. 25, *infra*).

Finally, it is the defendant, not the plaintiff, who has the right to file and to voluntarily dismiss the counterclaim. The trial judge dismissed the complaint for want of federal jurisdiction and then the "subject to" counterclaim was dismissed. Federal Rule of Civil Procedure 41(c) expressly provides for the dismissal of counterclaims by defendants.

Professor Moore in commenting on the counterclaim aspect of this case has stated:

> "Moreover, the existence of a counterclaim for the total amount originally claimed before the Board should not change the outcome. As pointed out *infra*, the amount of a counterclaim should not be added to the original claim in determining the jurisdictional amount. If such amount is not present in the original claim, the action is subject to dismissal. And while the amount of a compulsory counterclaim may itself exceed the jurisdictional amount, and the counterclaim should not be dismissed if the defendant who was compelled to come into federal court wishes the action there tried, in this case the defendant moved to dismiss. He should have the option to return to state court, when plaintiff has not brought a claim that fulfills the jurisdictional amount requirement. And this will accord with the

policy of Congress, as the district court pointed out in *Chamberlain*, without doing violence to any jurisdictional principles." 1 Moore's Federal Practice, paragraph 0.93 [5.-3], pp. 859-860 (2d ed. 1960).

With all deference to the Fifth Circuit, to uphold jurisdictional amount on the basis of a defendant's counterclaim filed subject to motion to dismiss is unnecessarily advocating a quicksand theory of federal jurisdiction contrary to the very spirit of the Rules of Procedure and the Congressional purpose to limit federal jurisdiction.

V.

The Proceeding By Respondent-Insurer To Set Aside State Administrative Agency's Award In Favor Of Petitioner-Employee Is Not An Original Action Within Jurisdiction Of A Federal District Court.

Petitioner's basic position is that the amount in controversy is not presented under the Respondent-insurer's cause of action to set aside the Board's $1,050.00 award. The point now under discussion is significant because the original civil action requirement of 28 U.S.C. §1332 precludes the Respondent from asserting that the Petitioner-employee's claim before the Board constitutes the amount in controversy. The amount claimed before the Board could only be the amount in controversy here if this action was a true appellate review and continuation of the administrative proceedings. Or conversely, if this suit is an original civil action, the amount in controversy must be determined by the plaintiff's (Respondent's) cause of action.

Although this Court has not previously considered the Texas Workmen's Compensation law, it has considered

analogous various condemnation cases involving appeals from State administrative boards. As District Judge Whittaker stated in *Collins* v. *Public Service Comm'n*, 129 F. Supp. 722, 726 W.D. Mo. 1955): "The analogy between this type of proceeding [condemnation] and the Workmen's Compensation cases is, I think, so close as to be indistinguishable." This similarily was noted by Judge Estes and applied, under an identical fact situation as here involved, to the Texas Workmen's Compensation law in *National Surety Corp.* v. *Chamberlain*, 171 F. Supp. 591 (N.D. Tex. 1959).

In *Chicago R.I. & P. RR.* v. *Stude*, 346 U.S. 574, the sheriff upon application of the railroad to condemn land had appointed a commission of six resident freeholders that assessed damage at $23,888.60. The railroad "appealed" to the federal district court alleging the $23,888.60 award to be excessive and asking that damages be fixed at not more than $10,000. This Court after noting that "the action is brought not by the person injured, namely, the landowner, but by the railroad that inflicted the damage", held that the suit was not an original action. In the case at bar, as in the *Stude* case, the appeal was *de novo*. The *Stude* case would not apply here if this action had been brought by the injured employee. In this case the court below rejected the application of the *Stude* case: "The second ground ['(2) that the Texas statutory compensation suit must be analyzed to efforts to have state condemnation proceedings reviewed in the federal courts'] is even less substantial. The result of wishful thinking and whistling in the dark, it presents nothing more than shadow boxing, the putting up of a straw man to smack him down" (Record, p. 47 [p. 46]).

In the *Stude* case it would have been possible for this Court to place the decision on other grounds. The ratio

decidendi of the holding was that the railroad phrased its complaint in terms of an appellate review and that the federal district courts have no appellate jurisdiction. See Note, 64 Yale L.J. 600, 603 (1955). In the instant case Respondent by his complaint asked for a review of the administrative proceedings (Respondent's Complaint, paragraphs 4, 6, 7, Record, pp. 3-4). Respondent for purposes of satisfying the federal jurisdiction amount requirement can not urge that the instant suit is a continuation of the administrative proceeding; and then for purposes of satisfying the original civil action requirement contend that this is a wholly separate and original proceeding.

Moreover, as was true in the *Stude* case, Respondent here is not the injured party. There would seem to be no basis for a *tort feasor* (*i.e.*, the true defendant) to bring an original action in federal district court to obtain a declaration of nonliability other than pursuant to the federal declaratory judgment act. 28 U.S.C. §§2201, 2202. This Court in *Willing* v. *Chicago Auditorium Ass'n*, 277 U.S. 274, held that absent a declaratory judgment statute federal courts have no authority to give declaratory judgments. The present suit was not brought under the federal declaratory judgment act and, indeed, if it had been, the fact that the Petitioner has a state court action pending (Record, pp. 27-30) would in itself be sufficient grounds to refuse to entertain the declaratory judgment proceeding.

Conclusion

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed and the suit ordered dismissed for want of federal jurisdiction.

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December, 1960

APPENDIX

APPENDIX A—JURISDICTION OF FEDERAL COURTS IN DIVERSITY OF CITIZENSHIP AND FEDERAL QUESTION CASES: PROHIBITING THE REMOVAL TO DISTRICT COURTS OF THE UNITED STATES OF ACTIONS COMMENCED IN STATE COURTS UNDER WORKMEN'S COMPENSATION LAWS.

Sen. Rep. No. 1830, 85th Cong., 2d Sess.; 2 U.S. Code Cong. & Admr. News 3099 (1958) (in relevant part) .. 1a

APPENDIX B—WORKMEN'S COMPENSATION LAW.

Texas Civil Statutes (Vernon, 1948; Supp. 1958) Art. 8307, 8307a, 8307b, (in relevant part) 11a

APPENDIX C—PLEA IN ABATEMENT, EMMET HORTON v. LIBERTY MUTUAL INSURANCE COMPANY, No. 12,365 IN THE DISTRICT COURT OF ORANGE COUNTY, TEXAS 18a

APPENDIX A

Calendar No. 1865

85TH CONGRESS
2d Session SENATE REPORT No. 1830

JURISDICTION OF FEDERAL COURTS IN DIVERSITY OF CITIZENSHIP AND FEDERAL QUESTION CASES: PROHIBITING THE REMOVAL TO DISTRICT COURTS OF THE UNITED STATES OF ACTIONS COMMENCED IN STATE COURTS UNDER STATE WORKMEN'S COMPENSATION LAWS

JULY 11 (legislative day, JULY 10), 1958—Ordered to be printed

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Mr. EASTLAND, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 11102]

The Committee on the Judiciary, to which was referred the bill (H. R. 11102) amending the jurisdiction of district courts in civil actions with regard to the amount in controversy and diversity of citizenship, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

PURPOSE

The purpose of the proposed legislation is to increase the amount in controversy in cases of a Federal question and of diversity of citizenship from the existing $3,000 to $10,000. It further provides, for purposes of diversity of citizenship jurisdiction, that a corporation is to be deemed a citizen of the State by which it has been incorporated and

of the State where it has its principal place of business. The bill further provides that a civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

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JURISDICTIONAL AMOUNT

The recommendations of the Judicial Conference regarding the amount in controversy, which this committee approves, is based on the premise that the amount should be fixed at a sum of money that will make jurisdiction available in all substantial controversies where other elements of Federal jurisdiction are present. The jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies. The present requirement of $3,000 has been on the statute books since 1911 and obviously the value of the dollar in terms of its purchasing power has undergone marked depreciation since that date. The Consumers Price Index for moderate income families in large cities indicates a rise of about 152 percent since 1913, shortly after the present $3,000 minimum was established. It is apparent that since $3,000 was the smallest amount that was considered substantial in 1911 for problems of Federal jurisdiction, there is today no substantiality in such an amount for jurisdictional problems. Accordingly the committee believes that the standard for fixing jurisdictional amounts should be increased to $10,000.

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PROHIBITING REMOVAL OF WORKMEN'S COMPENSATION CASES TO FEDERAL COURTS

It is well settled that the United States district courts have only such jurisdiction as is vested in them by Congress pursuant to the power granted by article III of the Constitution. In the early case of *Cary* v. *Curtis* (44 U.S. [3 How.] 235), the Supreme Court stated the rule as follows:

"* * * * the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the Government, and to give to the former powers limited by its own discretion merely * * *" (p. 244).

See also *Chicot County Drainage* v. *Bank* (308 U.S. 371, 376); *Lauf* v. *Shinner* (303 U.S. 323, 330); *Hallowell* v. *Commons* (239 U.S. 506, 509). Since removal jurisdiction in the Federal district courts exists by virtue of statute, it is within the authority of Congress to prohibit removal to these courts. See discussion in a recent case (1956), *In re Green River Drainage Area* (147 F. Supp. 127, 140). See also *Kansas City Southern* v. *Cook* ((1911), 140 S.W. 579, 100 Ark. 467).

The jurisdiction of Federal courts based on diversity of citizenship goes back to the beginning of the Federal judicial system, having been established by the Judiciary Act of 1789. This grant of jurisdiction by the Congress to the Federal courts in diversity of citizenship cases was to guard against possible discrimination by State courts in favor of resident over nonresident litigants. This authority to resort to the Federal rather than to the State courts in diversity cases has led to abuse. The great increase in diversity cases in recent years has placed great burdens on the Federal judiciary; as was well stated by Mr. Justice Frankfurter in *Lumbermen's Mutual Casualty Company* v. *Florence R. Elbert* (348 U.S. 48, 60, 61).

"Since diversity jurisdiction is increasingly the biggest source of the civil business of the district courts, the continuance of that jurisdiction will necessarily involve inflation of the number of the district judges. This in turn will result, by its own Gresham's law, in a depreciation of the judicial currency and the consequent impairment of the prestige and of the efficacy of the Federal courts. Madison believed that Congress would return to the State courts judicial power entrusted to the Federal courts 'when they find the tribunals of the States established on a good footing.' 3 Elliot's Debates 536 (1891). Can it fairly be said that State tribunals are not now established on a sufficiently 'good footing' to adjudicate State litigation that arises between citizens of different States, including the artificial corporate citizens, when they are the only resort for the much larger volume of the same type of litigation between their own citizens? Can the State tribunals not yet be trusted to mete out justice to nonresident litigants; should resident litigants not be compelled to trust their own State tribunals? In any event, is it sound public policy to withdraw from the incentives and energies for reforming State tribunals, where such reform is needed, the interests of influential groups who through diversity litigation are now enabled to avoid State courts?"

In a number of States the workload of the Federal courts has greatly increased because of the removal of workmen's compensation cases from the State courts to the Federal courts. Statistics prepared by the Division of Procedural Studies and Statistics, Administrative Office of the United States Courts, graphically display the effect of the workmen's compensation suits removed from State to Federal courts in Texas and New Mexico. These studies for the fiscal year 1957 are as follows:

Workmen's compensation suits commenced in the United States district courts in Texas during the fiscal year 1957, showing the number of original suits and the number of suits removed from State courts

	Total Cases	Original Actions	Removed From State Court	Remanded, Reopened or Received by Transfer
Northern district:				
Insurance company:				
Plaintiff	10	10	—	—
Defendant	795	435	350	10
Eastern district:				
Insurance company:				
Plaintiff	8	7	1	—
Defendant	392	177	213	2
Southern district:				
Insurance company:				
Plaintiff	5	3	1	1
Defendant	678	204	472	2
Western district:				
Insurance company:				
Plaintiff	5	5	—	—
Defendant	254	141	111	2
Total for State:				
Insurance company:				
Plaintiff	28	25	2	1
Defendant	2,119	957	1,146	16
Total	2,147	982	1,148	17

Workmen's compensation suits commenced in the United States district court in New Mexico during the fiscal year 1957, showing the number of original suits and the number of suits removed from State courts

	Total Cases	Original Actions	Removed From State Court	Remanded, Reopened or Received by Transfer
1st quarter	12	3	9	—
2d quarter	20	2	18	—
3d quarter	23	2	20	1
4th quarter	13	4	8	1
Total	68	11	55	2

Workmen's compensation cases arise and exist only by virtue of State laws. No Federal question is involved and no law of the United States is involved in these cases.

The removal of workmen's compensation cases from State courts to the Federal courts adds to the already overburdened docket of the Federal courts, the congestion in some of which is now most deplorable.

Nearly all of the State statutes on workmen's compensation provide summary proceedings for the expeditious and inexpensive settlement of claims by injured workmen against the employer. The procedure provided in such State statutes is not, as a rule, applicable to procedure in Federal courts. When cases are removed to the Federal court the State statutes, in many instances, are entirely nullified. For instance, some of these State statutes limit the venue to the place where the accident occurred or to the district of the workman's residence. When removed to the Federal court the venue provisions of the State statute cannot be applied. Very often cases removed to the Federal courts require the workman to travel long distances and to bring his witnesses at great expense. This places an undue burden upon the workman and very often the work-

man settles his claim because he cannot afford the luxury of a trial in Federal court.

Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws which are similar to the workmen's compensation acts of the States. In the Jones Act, the Fair Labor Standards Act, and the Railway Employers' Liability Act, all of which are in the nature of workmen's compensation cases, the Congress has given the workman the option of filing his case in either the State court or the Federal court. If filed in the State courts the law prohibits removal to the Federal court. This proposed legislation accomplishes this same purpose and grants the same privilege to workmen who are entitled to compensation under the State workmen's compensation act—that is, the workman has the option to file his case in either the Federal or the State court. If he files in the State court it is not removable to the Federal court.

Section 5 of the bill was added as an amendment on the floor of the House. The Committee on the Judiciary, at its meeting on June 30, had reported a bill, S. 1615, to the Senate. The language of the Senate bill is identical to the language inserted as an amendment on the floor of the House, that is, as now contained in section 5 of this bill.

The Judicial Conference of the United States has recognized the need for this legislation by approving S. 1615 as an appropriate limitation of the diversity jurisdiction.

The Department of Justice, in reporting to this committee on the merits of S. 1615, recommends favorable consideration of this legislation as an aid in meeting the problem of court congestion.

* * * * * * * *

SESSION OF MARCH 1957

Chief Judge Biggs reported that the Committee had considered at length various proposals for restricting or modifying the present diversity jurisdiction of the United States courts. The Committee found that the situation in respect to diversity jurisdiction is an extremely complex one and was not prepared to deal at length with the subject until further statistics have been procured from the

Administrative Office and the matter has been considered further.

Previously the Committee had recommended that the jurisdictional amount be placed at $15,000, exclusive of interest and costs, but it was now of the view that it should modify its former recommendation and adhere to that expressed by the Committee on Jurisdiction and Venue of which Chief Judge Parker was Chairman. Accordingly, it unanimously resolved that the Committee recommend to the Judicial Conference that the jurisdictional amount in diversity cases be increased to $10,000, exclusive of interest and costs, and that every effort be made to procure the enactment of such legislation by the present Congress.

The Committee also was of the view that the recommendation made to the Conference by the Committee on Jurisdiction and Venue, that a corporation be deemed to be a citizen not only of the State of its incorporation but also of the State in which it has its principal place of business, should be renewed at the present Congress.

These recommendations were adopted by the Conference and the Committee was authorized to continue its study of jurisdiction in diversity of citizenship cases.

DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D. C., April 28, 1958.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
United States Senate, Washington, D. C.

DEAR SENATOR: This is in response to your request for the views of the Department of Justice concerning the bill (S. 1615) to prohibit the removal to district courts of the United States of actions commenced in State courts under State workmen's compensation laws.

The bill would amend section 1445 of title 28, United States Code, by adding a new category of actions which may not be removed under the section from State to Federal district courts. The bill would provide that a civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

It is well established that the United States district courts have only such jurisdiction as is vested in them by Congress pursuant to the power granted by article III of the Constitution. In the early case of *Cary* v. *Curtis* (44 U.S. 235), the Supreme Court stated the rule as follows:

"* * * the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the Government, and to give to the former powers limited by its own discretion merely * * * *" (p. 244). See also *Chicot County Drainage* v. *Bank*, (308 U.S. 371, 376); *Lauf* v. *Shinner* (303 U.S. 323, 330); *Hallowell* v. *Commons* (239 U.S. 506, 509). Since removal jurisdiction in the Federal district courts exists by virtue of statute, it is within the authority of Congress to prohibit removal to these courts. See discussion in a recent case (1956), *In re Green River Drainage Area* (147 F. Supp. 127, 140). See also *Kansas City Southern* v. *Cook* (1911), 140 S.W. 579, 100 Ark. 467).

As an aid in meeting the problem of court congestion, the Department of Justice favors the legislation.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely yours,

LAWRENCE E. WALSH,
Deputy Attorney General.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS,
Washington, D. C., March 7, 1958.

Hon. JAMES D. EASTLAND,
Chairman, Committee on the Judiciary,
United States Senate, Washington, D. C.

DEAR MR. CHAIRMAN: The Judicial Conference of the United States, at its session in September 1957, considered the proposal contained in S. 1615, now pending before your committee, to prohibit the removal to district courts of the United States of actions commenced in State courts under State workmen's compensation laws. At that time, the committees of the Conference on Court Administration and Supporting Personnel, in a joint report, stated that the United States district courts in Texas, Alabama, and New Mexico receive a substantial number of such cases by removal and that the district courts of Louisiana receive some such cases.

I am authorized to inform you that the Judicial Conference of the United States, upon the recommendation of the committees, approved S. 1615 as an appropriate limitation of the diversity jurisdiction.

Sincerely yours,

WARREN OLNEY III, *Director.*

* * * * * * *

APPENDIX B

Workmen's Compensation Law

Texas Civil Statutes (Vernon, 1948; Supp. 1958)
Art. 8307, 8307a, 8307b (in relevant part).

Art. 8307.

Rules; Physical Examination; Suspension of Compensation; Procedure and Powers

Sec. 4. The board may make rules not inconsistent with this law for carrying out and enforcing its provisions, and may require any employee claiming to have sustained injury to submit himself for examination before such board or someone acting under its authority at some reasonable time and place within the State, and as often as may be reasonably ordered by the board to a physician or physicans, a chiropractor or chiropractors authorized to practice under the laws of this State. If the employee or the association requests, he or it shall be entitled to have a physician or physicians, chiropractor or chiropractors of his or its owns selection present to participate in such examination. Refusal of the employee to submit to such examination shall deprive him of his right to compensation during the continuance of such refusal. When a right to compensation is thus suspended no compensation shall be payable in respect to the period of suspension. If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery, or shall refuse to submit to such medical or surgical treatment, chiropractic service or other remedial treatment recognized by the State, as is reasonably essential to promote his recovery, the board may in its discretion order or direct the association to reduce or suspend the compensation of any such injured employee. No compensation shall be reduced or suspended under the terms of this section without reasonable notice to the employee and an opportunity to be heard.

When authorized by the board, the association shall have the privilege of having any injured employee examined by a physician or physicians, chiropractor or chiropractors of

its own selection, at reasonable times, at a place or places suitable to the condition of the injured employee and convenient and accessible to him. The association shall pay for such examination and the reasonable expense incident to the injured employee in submitting thereto. The injured employee shall have the privilege to have a physician or chiropractor of his own selection present to participate in such examination. Provided, when such examination is directed by the board at the request of the Association, the Association shall pay the fee of the physician or chiropractor selected by the employee, such fee to be fixed by the Board.

Process and procedure shall be as summary as may be under this law. The board or any member thereof shall have power to subpoena witnesses, administer oaths, inquire into matters of fact, examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute, punish for contempt in the same manner and to the same extent as a District Court may do, and to bar persons guilty of unethical or fraudulent conduct from practicing before the Board. All rulings and decisions of the board relating to disputed claims shall be upon questions of fact and in accord with the provisions of this law.

Notice of Injury; Claim for Compensation

Sec. 4a. Unless the association or subscriber have notice of the injury, no proceeding for compensation for injury under this law shall be maintained unless a notice of the injury shall have been given to the association or subscriber within thirty days after the happening of an injury or the first distinct manifestation of an occupational disease, and unless a claim for compensation with respect to such injury shall have been made within six months after the occurrence of the injury or the first distinct manifestation of an occupational disease; or, in case of death of the employee or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity. For good cause the board may, in meritorious cases, waive the strict compliance with the foregoing limitations as to notice, and the filing of the claim before the board.

Determination of Questions; Suit to Set Aside Final Ruling and Decision; Revocation of Association's License

Sec. 5. All questions arising under this law, if not settled by agreement of the parties interested therein and within the provisions of this law, shall, except as otherwise provided, be determined by the board. Any interested party who is not willing and does not consent to abide by the final ruling and decision of said board shall within twenty (20) days after the rendition of said final ruling and decision by said board, file with said board notice that he will not abide by said final ruling and decision. And he shall within twenty (20) days after giving such notice bring suit in the county where the injury occurred to set aside said final ruling and decision, and said board shall proceed no further toward the adjustment of such claim, other than hereinafter provided. In all cases of occupational diseases for the purpose of determining venue when an appeal is effected to set aside the final ruling and decision of the Board, suit shall be brought in a court of competent jurisdiction in the said county in which the employee was last exposed to the disease alleged, prior to the manifestation of the disease, or death therefrom, or in the county in which the adverse party resides, or has a permanent place or business, or by agreement of the parties in a court of competent jurisdiction in any county in this state. Whenever such suit is brought, the rights and liability of the parties thereto shall be determined by the provision of this law, and the suit of the injured employee or person suing on account of the death of such employee shall be against the association, if the employer of such injured or deceased employee at the time of such injury or death was a subscriber as defined in this law. If the final order of the board is against the association, then the association and not the employer shall bring suit to set aside said final ruling and decision of the board, if it so desires, and the court shall in either event determine the issues in such cause instead of the board upon trial de novo and the burden of proof shall be upon the party claiming compensation. The Industrial Accident Board shall furnish any interested party in said claim pending in court upon

request free of charge, with a certified copy of the notice of the employer becoming a subscriber, filed with the Board, and the same when properly certified to shall be admissible in evidence in any court in this State upon trial of such claim therein pending and shall be prima facie proof of all facts stated in such notice in the trial of said cause unless same is denied under oath by the opposing party therein. In case of recovery, the same shall not exceed the maximum compensation allowed under the provisions of this law. If any party to such final ruling and decision of the board, after having given notice as above provided, fails within said twenty (20) days to institute and prosecute a suit to set the same aside, then said final ruling and decision shall be binding upon all parties thereto; and, if the same is against the association, it shall at once comply with such final ruling and decision; and failing to do so the board shall certify the fact to the Commissioner of Insurance and such certificate shall be sufficient cause to justify said Commissioner to revoke or forfeit the license or permit of such association to do business in Texas.

Notwithstanding any other provision of this law, as amended, no award of the Board, and no judgment of the court, having jurisdiction of a claim against the association for the cost or expense of items of medical aid, hospital services, nursing, chiropractic services, medicines or prosthetic appliances furnished to an employee under circumstances creating a liability therefor on the part of the association under the provisions of this law, shall include in such award or judgment any cost or expense of any such items not actually furnished to and received by the employee prior to the date of said award or judgment. The first such final award or judgment rendered on such claim shall be res judicata of the liability of the association for all such cost or expense which could have been claimed up to the date of said award or judgment and of the issue that the injury of said employee is subject to the provisions of this law with respect to such items, but shall not be res judicata of the obligation of the association to furnish or pay for any such items after the date of said award or judgment. After the first such final award or judgment, the Board shall have continuing juris-

diction in the same case to render successive awards to determine the liability of the association for the cost or expense of any such items actually furnished to and received by said employee not more than six (6) months prior to the date of each such successive award, until the association shall have fully discharged its obligation under this law to furnish all such medical aid, hospital services, nursing, chiropractic services, medicines or prosthetic appliances to which said employee may be entitled; provided, each such successive award of the Board shall be subject to a suit to set aside said award by a court of competent jurisdiction, in the same manner as provided in the case of other awards under this law.

Rights and Remedies

Sec. 5a. In all cases where the board shall make a final order, ruling or decision as provided in the preceding section and against the association, and the association shall fail and refuse to obey or comply with the same and shall fail or refuse to bring suit to set the same aside as in said section is provided, then in that event, the claimant in addition to the rights and remedies given him and the board in said section may bring suit where the injury occurred, upon said order, ruling or decision. If he secures a judgment sustaining such order, ruling or decision in whole or in part, he shall also be entitled to recover the further sum of twelve per cent as damages upon the amount of compensation so recovered in said judgment, together with a reasonable attorney's fee for the prosecution and collection of such claim.

Where the board has made an award against an association requiring the payment to an injured employee or his beneficiaries of any weekly or monthly payments, under the terms of this law, and such association should thereafter fail or refuse, without justifiable cause, to continue to make said payments promptly as they mature, then the said injured employee or his beneficiaries, in case of his death, shall have the right to mature the entire claim and to institute suit thereon to collect the full amount thereof, together with twelve per cent penalties and attorney's

fees, as herein provided for. Suit may be brought under the provisions of this section, either in the county where the accident occurred, or in any county where the claimants reside, or where one or more of such claimants may have his place of residence at the time of the institution of the suit.

COMPUTATION OF TIME FOR NOTICE OR SUIT

Sec. 5b. In computing the twenty (20) days for the filing with the Board notices of unwillingness to abide by the final ruling and decision of the Board, and likewise in computing the twenty (20) days to institute a suit to set aside the final ruling of said Board, if the last day is a legal holiday or is Sunday, then, and in such case, such last day shall not be counted, and the time shall be and the same is hereby extended so as to include the next succeeding business day; but this provision shall not extend to or include any cases now filed or now pending in the trial court or on appeal from the trial court; the rights of the parties in such suits now pending or on appeal from the trial courts shall be determined by the law existing prior to the passage of this Act.

Art. 8307a. Suit to set aside decision by Industrial Accident Board; transfer to county where injury occurred.

Any interested party who is not willing and does not consent to abide by the final ruling and decision of the Industrial Accident Board shall, in the manner and within the time provided by Section 5 of Article 8307, Revised Civil Statutes of 1925, file notice with said Board, and bring suit in the county where the injury occurred to set aside said final ruling and decision; however, in the event such suit is brought in any county other than the county where the injury occurred, the court in which same is filed shall, upon ascertaining that it does not have jurisdiction to render judgment upon the merits, transfer the case to the proper court in the county where the injury occurred. Provided, however, that notice of said transfer shall be given to the parties and said suit when filed in the court to which the transfer is made, shall be considered for all purposes, the same as if originally filed in said court.

Art. 8307b. Presumptions on appeal from Board; denial by verified pleadings.

In the trial of any case appealed to the court from the board the following, if plead, shall be presumed to be true as plead and have been done and filed in legal time and manner, unless denied by verified pleadings:

(1) Notice of injury;

(2) Claim for compensation;

(3) Award of the board;

(4) Notice of intention not to abide by the award of the board;

(5) Filing of suit to set aside the award.

Such denial may be made in original or amended pleadings; but if in amended pleadings such must be filed not less than seven days before the case proceeds to trial. In case of such denial the things so denied shall not be presumed to be true, and if essential to the case of the party alleging them must be proved.

APPENDIX C

RESPONDENT'S PLEA IN ABATEMENT TO PETITIONER'S STATE COURT ACTION

IN THE DISTRICT COURT OF ORANGE COUNTY, TEXAS

12,365

EMMET HORTON

vs.

LIBERTY MUTUAL INSURANCE COMPANY

DEFENDANT'S ORIGINAL PLEA IN ABATEMENT

COMES NOW Liberty Mutual Insurance Company, defendant in the above entitled and numbered cause, and files this its plea in abatement and for cause therefor would respectfully show unto the court the following:

1.

This is a workmen's compensation suit brought in this court on May 6, 1959 by Emmet Horton seeking to recover total permanent disability for injuries allegedly sustained while in the course of his employment for United States Steel Corporation, American Bridge Division in Orange County, Texas, on or about October 8, 1957.

2.

On April 30, 1959, the Industrial Accident Board of the State of Texas, made, entered and rendered its final award and decree in the plaintiff's claim, and on April 30, 1959, the defendant Liberty Mutual Insurance Company filed its notice of dissatisfaction with the Industrial Accident Board, and of its intention to appeal the award of said Board to a court of competent jurisdiction. Subsequent

to the filing of such notice of dissatisfaction by Liberty Mutual Insurance Company defendant herein, it did as plaintiff, in Civil Action No. 4162 in the United States District Court, Eastern District of Texas, Beaumont Division, file its suit to set aside the award of the Industrial Accident Board, such suit being filed on April 30, 1959. Summons was issued and the complaint and summons was served upon Emmet Horton, defendant in the Federal Court suit, and the plaintiff herein, on May 5, 1959.

2.

Defendant Liberty Mutual Insurance Company would respectfully show unto the court, Civil Action 4162, presently pending in the United States District Court, Eastern District of Texas, by and between the same parties, concerning the same claim made by Emmet Horton arising out of the same accident, made the basis of this suit, was prior in time and filed in a court of competent jurisdiction, and that this suit should be in all things abated and dismissed by the reason of such prior pending litigation by and between the same parties involving the precise subject matter as the instant suit.

WHEREFORE, premises considered, defendant prays that upon hearing of its plea in abatement that said plea be in all things sustained and that the above entitled and numbered suit be for the reasons herein stated, dismissed and abated and for such other and further relief as it may be justly entitled to receive.

ORGAIN, BELL & TUCKER
First Federal Savings Building
Beaumont, Texas
By /s/ HOWELL COBB
Howell Cobb
Attorney for Defendant

THE STATE OF TEXAS)
COUNTY OF JEFFERSON)

BEFORE ME, the undersigned authority on this day personally appeared Howell Cobb, who being duly sworn, did depose and say: My name is Howell Cobb. I am attorney of record for Liberty Mutual Insurance Company, and authorized to make this affidavit. I have read and am familiar with the facts stated in the foregoing plea in abatement and upon oath say that they are in all things true and correct.

/s/ HOWELL COBB
Howell Cobb

SWORN TO AND SUBSCRIBED before me this 28th day of May A. D., 1959, to certify which witness my hand and seal of office.

/s/ [Illegible]
Notary Public in and for
Jefferson County, Texas

FILE COPY

PETITION NOT PRINTED

Office-Supreme Court, U.S.
FILED
JAN
JAMES R. [illegible], Clerk

IN THE

Supreme Court of the United States

October Term, 1960

NO. 478

EMMETT HORTON, *Petitioner*

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Respondent

BRIEF FOR THE RESPONDENT

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IN THE

Supreme Court of the United States

October Term, 1960

NO. 478

EMMETT HORTON, *Petitioner*

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Respondent

BRIEF FOR THE RESPONDENT

Statement of the Nature of the Case and Result Below

Petitioner, alleging that he sustained total and permanent disability resulting from an accidental injury while employed by the American Bridge Division of United States Steel Corporation in Orange County, Texas, filed his claim before the Texas Industrial Accident Board claiming that respondent, the insurer for his employer, owed him $14,035.

The Board entered an award of $1,050, and Respondent duly filed suit in the United States District Court, Eastern District of Texas, seeking to be relieved of the claimed liability of $14,035 asserted by Horton.

Jurisdiction was based upon the diversity statute (28 U.S.C., § 1332).

After suit was brought, Horton moved to dismiss, and also filed a counterclaim for $14,035 alleging total permanent disability. The counterclaim was filed "subject to" the motion to dismiss.

One week after this suit was filed, Horton also brought suit in the District Court of Orange County, Texas, against respondent for $14,035, alleging total permanent disability from the same injury.

The U. S. District Court dismissed the action on the ground that less than $10,000 was involved between the parties, and the U. S. Court of Appeals for the Fifth Circuit reversed the District Court and ordered the cause reinstated. 275 F. 2d 148. Petitioner sought certiorari to review that action.

RESPONDENT'S COUNTERPOINTS

First Counterpoint

Jurisdiction is present in this case because respondent brought suit to be relieved of a liability of $14,035 as claimed by petitioner, and this claimed liability is the true amount in controversy.

Second Counterpoint

Jurisdiction is present because petitioner voluntarily filed a counterclaim for more, and not less, than $10,000, and the counterclaim had independent grounds of jurisdiction to support it.

First Counterpoint Restated

Jurisdiction is present in this case because respondent brought suit to be relieved of a liability of $14,035 as claimed by petitioner, and this claimed liability is the true amount in controversy.

Argument and Authorities

There is no Federal law allowing Horton any recovery for the injury he claims he sustained in the accident in question. Those rights are afforded him by state law, Article 8306, et seq., *Revised Civil Statutes of Texas.* Pursuant to the state law he made his claim that respondent owed him $14,035 in workmen's compensation. Having asserted this claim before the appropriate board, that claim as made by him fixes forever the money value of the right he seeks to enforce, and the money value of liability from which respondent seeks relief.

Petitioner throughout his brief asserts the only relief sought is to set aside the award of $1,050. Such is not the case. This is not an appeal of an administrative board merely because petitioner says it is. The Supreme Court of Texas, in *Booth v. Texas Employers Ins. Assn.*, 123 S.W. 2d 322 (Tex. Comm. App., opinion adopted by the Supreme Court, 1938), stated:

> " . . . *The suit to set aside an award of the board is in fact a suit,* ***not an appeal.*** It is filed as any other suit is filed and when filed the subject matter is withdrawn from the board. Section 5, as amended, of Article 8307, prohibits the board from proceeding further toward the adjudication of the claim after the filing of the suit. *The trial in court is de novo, wholly without reference to what may have been decided by*

> *the board*. It is true that as conditions precedent to the filing of suit the insurer or the employer must have been notified of the injury, claim must have been filed with the board, and the board must have made a final ruling and decision (Section 4a, Article 8307), *but these requirements do not negative the fact that a suit is filed and tried, not merely an appeal taken.*" (Emphasis added.)

But by his own voluntary act, the employee fixes the money value of the right he seeks to enforce. In *Booth v. Texas Employers*, supra, the court further holds:

> "When the claim filed with the board shows the amount claimed, in dollars and cents or by statement of facts from which the amount can definitely be determined and the award of the board is less in amount than that of the claim, *the amount shown by the claim is the amount in controversy* and the suit should be filed in the court having jurisdiction of that amount." (Emphasis added.)

This, then, is the money value of the matter in controversy between the parties. Horton made his claim for $14,035, and respondent seeks to relieve itself from such claimed lia' ility. Horton's right to recover that sum, and respondent's effort to resist is the thing in controversy, the subject matter of the suit.

Petitioner seeks to reverse the decision below on the ground that Horton *might* not recover that much on a trial. This is true, but does not oust jurisdiction.

Here, respondent has had asserted against it a claim (made in good faith) by Horton that he is entitled to $14,035. By bringing suit, it seeks to resist that total claim,

and thus relieve itself of such claimed liability. Horton set the money value by filing his claim for $14,035, respondent did not.

Petitioner argues to the court that since Congress has stopped *removal* of all workmen's compensation cases to the Federal Courts because of heavy caseloads, that it therefore meant to stop the filing of original actions by insurers in such courts. If such be the case, then the words "or filed" should have been added to 28 U.S.C., Sec. 1445 (c) following:

> " . . . a civil action in any State Court arising under the workmen's compensation laws of such state *may not be removed*. . . . "

However persuasive the reasons for inclusion of the words "or filed" in subsection (c) of Sec. 1445, such was not done. Actually, Congressional intent must have been to leave those words out, since in the report included in petitioner's brief, p. 5 a, appendix, it is shown that while preventing *removal*, Congress was aware that in 1957 alone, over 900 original workmen's compensation actions were filed directly in the U. S. District Courts of Texas. Also, petitioner shows that during that same year of 1957, the average award of the Industrial Accident Board of Texas was less than $1,000.00 (Petitioner's brief, p. 14, F.N. 3).

In short, petitioner is trying to engraft a prohibition against the filing of a direct action because of the reasons that Congress prohibited removals. But it should not be done under the guise of Congressional intent, since Congress was aware in minute detail of the number of removals and of the number and frequency of original actions, and then chose to bar *only* removals.

Petitioner relies on the decision in *National Surety Co. v. Chamberlain,* 171 F. Supp. 591 (N. Dist. Texas 1959), in support of his contention. The *Chamberlain* case was dealt with by the Court of Appeals in a much more forceful manner than can we. But, we would point out to the court that in *Chamberlain* the *employee had brought his suit first in a Texas district court, and in the Federal Court the employee did not affirmatively seek relief by way of counterclaim.*

This court held in *Smith v. Adams*, 130 U.S. 167, 9 S. Ct. 566 (1889), 9 S. Ct. at 569:

> " . . . By a matter in dispute is meant the subject of litigation,—the matter upon which the action is brought and issue is joined, and in relation to which, if the issue be one of fact, testimony is taken. It is conceded that the pecuniary value of the matter in dispute may be determined, not only by the money judgment prayed, where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief prayed, *or by the pecuniary result to one of the parties immediately from judgment.*" (Emphasis added.)

That the money value of the right herein asserted by Horton is $14,035 should be apparent by his assertions before the Industrial Accident Board, his counterclaim in this very suit, and his subsequent suit in Orange County, Texas, (R. 27), for that same amount. For the District Court to dismiss for want of jurisdiction, it must appear as a legal certainty that *less* than $10,000 is involved between the parties.

St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 58 S. Ct. 586 (1938), holds, 58 S. Ct. at 289:

> *"It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."* (Emphasis added.)

Further, at p. 294, although discussing removal, it is stated:

> "The claim, whether well or ill founded in fact, fixes the right of the defendant to remove, and the plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election. *If he does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount*, and though he would be justly entitled to more, the defendant cannot remove." (Emphasis added.)

The same rationale applies here; if Horton truly did not desire to place the sum of $14,035 in controversy between himself and respondent, he could have *claimed* less before the Board.

Aetna Casualty & Surety Company v. Flowers, 330 U.S. 464, 67 S. Ct. 798 (1947), arising under the Tennessee Workmen's Compensation law, presented the question of jurisdictional amount. There, a Tennessee court had awarded compensation in installments, the total of which were above the jurisdictional minimum but the amount of those due at the time of suit was less. On removal by the insurer, the employee-claimant resisted on the grounds that the amount in controversy was the amount of payments then due since that was the only pecuniary certainty between the parties, and any future payments were uncertain and conjectural. The court rejected this view, stating, 330 U.S. 464, at 467-8:

"If this case were one where judgment could be entered only for the installments due at the commencement of the suit . . . future installments could not be considered in determining whether the jurisdictional amount was involved, even though the judgment would be determinative of liability for future installments as they accrued. . . . But this is not that type of case. For the Tennessee *statute which creates liability for the award contemplates a single action for the determination of claimant's right to benefits and a single judgment for the award granted. . . . Nor does the fact that it cannot be known as a matter of absolute certainty that the amount which may ultimately be paid, if respondent prevails, will exceed $3,000, mean that the jurisdictional amount is lacking. This Court has rejected such a restrictive interpretation of the statute creating diversity jurisdiction.*" (Emphasis added.)

The similarity of the *Flowers* case to the case at bar is striking. In both, it is the claimed liability of the insurer as asserted by the employee that fixes the money value of the right sought to be enforced.

Very closely related to this case are the cases where suit is brought by an insurer seeking to avoid some claimed liability upon an insurance policy. In *Hartford Accident & Indemnity Co. v. Northwest National Bank*, 228 F. 2d 391 (7th Cir. 1955), the insurer sought to cancel the policy although only $405.00 was then claimed. In passing on the jurisdictional amount, the court states, 228 F. 2d 391, 402:

"There remains to be considered the contention of the Bank that the suit as to it should have been dismissed for lack of jurisdiction on the ground that the requisite amount was not involved. This conten-

> tion is based upon the Bank's theory that there was nothing in dispute between plaintiffs and it other than the sum of $405.00, which the Bank had received from the plaintiff Hartford Fire Insurance Company in payment of damages to the car . . . which by the judgment under attack the Bank was required to pay to the insurer. We think this is a misconception of the situation . . . The amount in controversy was *the value of the policy in suit, or,* perhaps more accurately stated, *the amount of the liability which plaintiffs were called upon to assume,* and not merely the amount in dispute between the plaintiffs and the Bank." (Emphasis added.)

A similar holding is found in the case of *Aetna Casualty & Surety Co. v. Yeatts,* 99 F. 2d 665 (4th Cir. 1938).

In *General Accident Fire & Life Assurance Corporation v. Mostert,* 131 F. 2d 596 (5th Cir. 1942), it was stated:

> "It is conceded that under the Texas Compensation Law, Vernon's Annotated Civil Statutes of Texas, Art. 8306, a suit to set aside an award opens up for trial de novo the claim filed with the Board; and we assume, as the parties do, that the amount here in controversy *is the largest amount that could be recovered under the claim.*" (Emphasis added.)

Petitioner argues that the case of *Chicago, Rock Island & Pacific RR Co. v. Stude,* 346 U.S. 574, is analogous and controlling here. There are many reasons why the *Stude* case is not applicable. There, under Iowa statutes, the railroad instituted eminent domain proceedings in State Court, then after an adverse decision tried to (1) *remove* to Federal Court, and (2) *appeal* the case to federal court. The railroad's position was rejected, first because only a

defendant had the right of removal; and, second, because the federal courts have no appellate jurisdiction over State proceedings.

In this case, respondent has not attempted removal. Respondent initiated this action, which is a lawsuit, not an appeal. Petitioner cannot seriously contend that when an insurer files a workmen's compensation suit it is an attempted appeal of a State administrative board, and therefore prohibits; but when an employee does precisely the same thing it is a suit with proper jurisdictions in Federal Court. Petitioner's brief shows how many direct actions have been so filed. (Pet. Brief, p. 5a) The Senate Report, (Pet. Brief, 1a), and petitioner both argue that the employee should have his choice of forums. If there is jurisdiction for one party there should be for both, and the suit is not an attempted appeal of the decision of a state administrative agency.

Second Counterpoint Restated

Jurisdiction is present because petitioner voluntarily filed a counterclaim for more, and not less, than $10,000, and the counterclaim had independent grounds of jurisdiction to support it.

Argument and Authorities

After filing a motion to dismiss, petitioner filed a counterclaim in this suit seeking affirmative relief of $14,035, alleging independent jurisdictional grounds. This was filed "subject to" the motion to dismiss. Rule 12, *Federal Rules Civil Procedure*, allows only "defenses" and "objections" to be filed "subject to" another pleading. It

is submitted that a counterclaim of more than $10,000 is not a "defense" or "objection", and thus, the filing of the counterclaim invoked jurisdiction of the court, even if it were not present.

Here, petitioner claimed respondent owed him $14,035 before the accident board, in the counterclaim, and in his Orange County suit. He was not required to counterclaim for precisely $14,035, but could have (if he did not wish to invoke the court's jurisdiction) counterclaimed for $9,990. Then, if there were no jurisdiction of the main action, he would not invoke it on independent grounds.

In *Ginsburg v. Pacific Mut. Life Ins. Co. of California*, 69 F. 2d 97, (2d Cir. 1934), the court held:

> "We need not consider the jurisdictional controversy as to the amount the appellant sues to recover because the counterclaim interposed establishes the jurisdiction of the District Court. Merchants' Heat & Light Co. v. James B. Clow & Sons, 204 U.S. 286, 27 S. Ct. 285, 51 L. Ed. 488; O. J. Lewis Mercantile Co. v. Klepner, 176 F. 343 (C.C.A. 2), certiorari denied 216 U.S. 620, 30 S. Ct. 575, 54 L. Ed. 641. It seeks a repudiation and cancellation of a policy of insurance which involves a valuation of more than the $3,000. In Home Life Insurance Co. v. Sipp, 11 F. (2d) 474, the Third Circuit Court of Appeals held that where the counterclaim pleaded involved less than $3,000, it did not give jurisdiction, where the complaint also involved less than the required jurisdictional amount. But in the instant case, if the appellee succeeded, it would cancel a contract obligation of more than the requisite amount."

In *Isenberg v. Biddle*, 125 F. 2d 741 (D.C. App. 1941), the court said:

"As to the first, counsel insists that when the bill of complaint was dismissed, 'the keystone of the District Court's jurisdiction fell and the counterclaim should have been dismissed with the bill'. . . . Though it is suggested by Professor Shulman that it is implicit in the case that, if a plaintiff's action is dismissed for want of jurisdiction, the counterclaim falls, he adds that this is so only if there is no independent jurisdictional basis for the counterclaim. 45 Yale L. J. 393, 413. Here there is such independent basis, and the rule is that in such circumstances, when the counterclaim seeks affirmative relief, it is sustainable without regard to what happens to the original complaint. Lion Mfg. Corp. v. Chicago Flexible S. Co., 7 Cir., 106 F. 2d 930, 933; Vidal v. South American Securities Co., 2 Cir., 276 F. 855, 874; Jackson v. Simmons, 7 Cir., 98 F. 768. In the Jackson case the Court of Appeals of the Seventh Circuit said: 'But a cross bill which seeks affirmative relief is in the nature of an original bill wherein the cross complainant is the actor. Such a cross bill is not dependent upon the original bill, is not subject to the control of the complainant in the original bill, and does not fall with the dismissal of the original bill, whether that dismissal be the act of the complainant or the act of the court.' 98 F. page 773. And see also Buffalo Specialty Co. v. Vancleef, D. C., 217 F. 91."

Professor Moore states, in 3 *Moore's Federal Practice* 41, ¶ 13.15:

"If the plaintiff's claim is dismissed for lack of federal jurisdiction it must follow, of course, that a counterclaim must be dismissed also, *unless it had independent grounds of jurisdiction to support it.*

". . . Complementing this line of decision are cases which hold that although the original claim involves less than the jurisdictional amount, *federal*

> *jurisdiction can be sustained if the counterclaim (of the compulsory type) exceeds the jurisdictional amount;* and there are cases taking the view that the amounts involved in the original claim and counterclaim may be aggregated to make up the jurisdictional amount."

See also *Pioche Mines Consol., Inc., et al. v. Fidelity-Philadelphia Trust Co., et al.*, 206 F. 2d 336 (9th Cir. 1953, cert. den. 346 899); *Haberman v. Equitable Life Assurance Soc. of U. S.*, 224 F. 2d 301 (5th Cir. 1955, cert. den. 350 U.S. 948); *Lion Mfg. Co. v. Chicago Flexible Shaft Co.*, 106 F. 2d 930 (7th Cir. 1939); *Vidal v. South American Securities Co.*, 276 F. 855 (2d Cir. 1922); *Home Life Insurance Co. v. Sipp*, 11 F. 2d 474 (3rd Cir., 1926); *Roberts Min. and Mill Co. v. Schrader*, 95 F. 2d 522 (9th Cir., 1938); *Switzer Brothers v. Chicago Cardboard Co.*, 252 F. 2d 407 (7th Cir., 1958).

Respondent respectfully submits that a counterclaim for more than the jurisdictional amount, alleging independent jurisdictional grounds (R. pp. 14-19) is not such a "defense" or "objection" which is permissible under Rule 12, *Federal Rules Civil Procedure*, and petitioner invoked the jurisdiction of the court by filing it.

Conclusion

The matter in controversy and the issue here litigated is the right of respondent to be free from the claimed liability asserted against it by petitioner, upon which he placed a money value of $14,035. The suit by respondent is a suit, not merely an appeal, and the thing to be litigated in that suit is Horton's claim of $14,035, not an award of $1,050.

The right he seeks to enforce is given him by Texas, not Federal law. The Supreme Court of Texas, and the U. S. Court of Appeals many times have held the money value of that right and the money value of the claimed liability of the insurer is the maximum amount sought by the employee before the Industrial Accident Board. The decision below was correct, it should be affirmed.

Respectfully submitted,

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This is to certify that a true copy of the foregoing brief has been served on Petitioner's counsel, Joe H. Tonahill, P. O. Box 179, Jasper, Texas, and William VanDercreek, 3315 Daniels, Dallas 5, Texas, by depositing the same in the United States Mail with first class postage prepaid properly addressed.

/s/ Major T. Bell
MAJOR T. BELL

SUPREME COURT OF THE UNITED STATES

No. 478.—October Term, 1960.

Emmett Horton, Petitioner, v. Liberty Mutual Insurance Co. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 12, 1961.]

Mr. Justice Black delivered the opinion of the Court.

This case raises questions under that part of 28 U. S. C. § 1332, as amended in 1958,[1] which grants jurisdiction to United States District Courts of all civil actions between citizens of different States "where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs . . . ."

Petitioner, Horton, was injured while working for an employer in Texas insured by the respondent, Liberty Mutual Insurance Company. Pursuant to the Texas Workmen's Compensation Law,[2] petitioner filed a claim with the Texas Industrial Accident Board against his employer and the respondent insurance company alleging that he had been totally and permanently incapacitated and claiming the maximum recovery under the law of $35 per week for 401 weeks, or a total of $14,035. After administrative hearings the Board decided that petitioner would be disabled for only 30 weeks and accordingly made an award of only $1,050. Section 5 of Art. 8307 of the Texas Workmen's Compensation Law permits either the employee or the insurance company, if dissatisfied with an award, to "bring suit in the county where the injury occurred to set aside said final ruling," in which event the

[1] Act of July 25, 1958, 72 Stat. 415.

[2] Vernon's Tex Ann. Civ. Stat., Arts. 8306–8309.

issues shall be determined "upon trial de novo, and the burden or [*sic*] proof shall be upon the party claiming compensation," but in no event shall the court allow recovery in excess of the statutory maximum of $14,035. Acting under this provision of state law, the respondent, on April 30, 1959, the very day of the award, filed this diversity case in the United States District Court to set aside the award, alleging that petitioner had claimed, was claiming and would claim $14,035, but denying that petitioner was entitled to recover anything at all under Texas law. One week later the petitioner, who also was dissatisfied with the award, filed an action in the state court to set aside the Board's award and to recover in that court the full $14,035. After that, petitioner moved to dismiss the respondent's federal court suit on the ground that the value of the "matter in controversy" was only the amount of the award, $1,050, and not the amount of his claim of $14,035, although he also contemporaneously filed, subject to his motion to dismiss, what he designated as a compulsory counterclaim [3] for the full amount he had claimed before the Texas Board and in his Texas State Court suit. The District Court held that the "matter in controversy" in the federal action was only the amount of the $1,050 award that the respondent company had asked the court to set aside. In so holding the District Court relied on *National Surety Corp.* v. *Chamberlain*,[4] in which another District Court in Texas had reached the same conclusion as to jurisdiction largely on the basis of what it deemed to have been the purpose of Congress in enacting the 1958 amendment to 28 U. S. C. § 1332, which amendment rather severely cut down the jurisdiction of Federal District

[3] With exceptions not here relevant, Rule 13 (a) of the Federal Rules of Civil Procedure requires a party to file a counterclaim arising out of the transaction or occurrence that is the subject of the opposing party's claim.

[4] 171 F. Supp. 591.

Courts, particularly in state workmen's compensation cases. The Court of Appeals reversed,[5] and we granted certiorari to decide the important jurisdictional questions raised under the 1958 amendment.[6]

For reasons to be stated, we hold that the District Court has jurisdiction of the controversy.

First. It is true, as the *Chamberlain* opinion pointed out, that the purpose and effect of the 1958 amendment was to reduce congestion in the Federal District Courts partially caused by the large number of civil cases that were being brought under the long-standing $3,000 jurisdictional rule. This effort to reduce District Court congestion followed years of study by the United States Judicial Conference and the Administrative Office of the United States Courts, as well as by the Congress.[7] To accomplish this purpose the 1958 amendment took several different but related steps. It raised the requisite jurisdictional amount from $3,000 to $10,000 in diversity and federal question cases; it provided that a corporation is not only to be deemed a citizen of the State by which it was incorporated but also of the State where it has its principal place of business; and, most importantly here, it also for the first time forbade the *removal* of state workmen's compensation cases from state courts to United States District Courts. By granting district judges a discretionary power to impose costs on a federal court plaintiff if he should "recover less than the sum or value

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[5] 275 F. 2d 148.

[6] 364 U. S. 814.

[7] See H. R. Rep. No. 1706, 85th Cong., 2d Sess.; S. Rep. No. 1830, 85th Cong., 2d Sess.; Hearings on H. R. 2516 and H. R. 4497, Subcommittee of House Committee on the Judiciary, 85th Cong., 1st Sess. With particular reference to the provision barring removal of state workmen's compensation cases, see 104 Cong. Rec. 12689–12690; S. Rep. No. 1830, *supra*, p. 9; Annual Report of the Proceedings of the Judicial Conference of the United States, 1957, p. 15.

of $10,000," the amendment further manifested a congressional purpose to discourage the trying of suits involving less than $10,000 in federal courts. In discussing the question of state workmen's compensation cases, the Senate Report on the amendment evidenced a concern not only about the problem of congestion in the federal courts, but also about trial burdens that claimants might suffer by having to go to trial in federal rather than state courts due to the fact that the state courts are likely to be closer to an injured worker's home and may also provide him with special procedural advantages in workmen's compensation cases.[8]

The foregoing are some of the appealing considerations that led the District Court to conclude that it would frustrate the congressional purpose to permit insurers to file workmen's compensation suits in federal courts when Congress had deliberately provided that such suits could not be removed to federal courts if filed by claimants in state courts. But after the most deliberate study of the whole problem by lawyers and judges and after its consideration by lawyers on the Senate Judiciary Committee in the light of statistics on both removals and original filings,[9] Congress used language specifically barring removal of such cases from state to federal courts and at the same time left unchanged the old language which just as specifically permits civil suits to be filed in federal courts in cases where there are both diversity of citizenship and the prescribed jurisdictional amount. In this situation we must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth. Congress could very easily have used language to bar filing of workmen's compensation suits by the insurer as well as removal of such suits, and it could easily do so still. We therefore

[8] S. Rep. No. 1830, 85th Cong., 2d Sess., pp. 8–9.

[9] See, *id.*, p. 8.

hold that under the present law the District Court has jurisdiction to try this civil case between citizens of different States if the matter in controversy is in excess of $10,000.

Second. We agree with petitioner that determination of the value of the matter in controversy for purposes of federal jurisdiction is a federal question to be decided under federal standards,[10] although the federal courts must, of course, look to state law to determine the nature and extent of the right to be enforced in a diversity case. It therefore is not controlling here that Texas has held that the crucial factor for allocating its cases among different state courts on an amount-in-controversy basis is the amount originally claimed before its State Compensation Board.[11]

The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed "in good faith."[12] In deciding this question of good faith we have said that it "must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."[13] The complaint of the respondent company filed in the District Court, while denying any liability at all and asking that the award of $1,050 against it be set aside, also alleges that petitioner Horton has claimed, now claims and will claim that he has suffered total and permanent disability and is entitled to a maximum recovery of

[10] See, *e. g.*, *Shamrock Oil Corp.* v. *Sheets*, 313 U. S. 100, 104.

[11] *Booth* v. *Texas Employers' Ins. Assn.*, 132 Tex. 237, 252, 123 S. W. 2d 322, 331.

[12] *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 288, and cases there cited.

[13] *Id.*, at 289. See also *Bell* v. *Preferred Life Assurance Society*, 320 U. S. 238, 240; *Aetna Casualty Co.* v. *Flowers*, 330 U. S. 464, 468.

$14,035, which, of course, is in excess of the $10,000 requisite to give a federal court jurisdiction of this controversy. No denial of these allegations in the complaint has been made, no attempted disclaimer or surrender of any part of the original claim has been made by petitioner, and there has been no other showing, let alone a showing "to a legal certainty," of any lack of good faith on the part of the respondent in alleging that a $14,035 claim is in controversy. It would contradict the whole record as well as the allegations of the complaint to say that this dispute involves only $1,050. The claim before the Board was $14,035; the state court suit of petitioner asked that much; the conditional counterclaim in the federal court claims the same amount. Texas law under which this claim was created and has its being leaves the entire $14,035 claim open for adjudication in a *de novo* court trial, regardless of the award. Thus the record before us shows beyond a doubt that the award is challenged by both parties and is binding on neither; that petitioner claims more than $10,000 from the respondent and the respondent denies it should have to pay petitioner anything at all. No matter which party brings it into court, the controversy remains the same; it involves the same amount of money and is to be adjudicated and determined under the same rules. Unquestionably, therefore, the amount in controversy is in excess of $10,000.

Third. Petitioner contends, however, that even though the amount in controversy is more than $10,000, the suit filed by the company is nothing more than an appeal from a state administrative order, that a Federal District Court has no appellate jurisdiction and that the dismissal of the case by the District Court therefore is supportable on that ground. This contention rests almost entirely on *Chicago, R. I. & P. R. Co.* v. *Stude*, 346 U. S. 574, 581, which held that a United States District Court was without jurisdiction to consider an appeal "taken administra-

tively or judicially in a state proceeding." Aside from many other relevant distinctions which need not be pointed out, the *Stude* case is without weight here because, as shown by the Texas Supreme Court's interpretation of its compensation act:

> "The suit to set aside an award of the board is in fact a suit, not an appeal. It is filed as any other suit is filed and when filed the subject matter is withdrawn from the board."[14]

It is true that as conditions precedent to filing a suit a claim must have been filed with the Board and the Board must have made a final ruling and decision. But the trial in court is not an appellate proceeding. It is a trial *de novo* wholly without reference to what may have been decided by the Board.[15]

The Court of Appeals was right in holding that the District Court had jurisdiction of this case and its judgment is

Affirmed.

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[14] *Booth* v. *Texas Employers' Ins. Assn.*, 132 Tex. 237, 246, 123 S. W. 2d 322, 328.

[15] The character of the lawsuit is further illuminated by decisions of the Texas Supreme Court holding that the administrative award becomes vacated and unenforceable once the court has acquired jurisdiction of the cause and the parties even if a voluntary nonsuit is taken and the case dismissed without judgment on the merits. *Zurich General Accident Co.* v. *Rodgers*, 128 Tex. 313, 97 S. W. 2d 674; *Texas Reciprocal Ins. Assn.* v. *Leger*, 128 Tex. 319, 97 S. W. 2d 677. This makes it all the more clear that the matter in controversy between the parties to the suit is not merely whether the award will be set aside since the suit automatically sets it aside for determination of liability *de novo*.

SUPREME COURT OF THE UNITED STATES

No. 478.—October Term, 1960.

Emmett Horton, Petitioner, v. Liberty Mutual Insurance Co. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 12, 1961.]

Mr. Justice Clark, with whom The Chief Justice, Mr. Justice Brennan and Mr. Justice Stewart join, dissenting.

The Court turns a new furrow in the field of diversity jurisdiction today and, in so doing, plows under a rule of almost a quarter of a century's standing—the rule that in determining jurisdiction, "the sum claimed by the plaintiff controls if the claim is apparently made in good faith." *St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 288 (1938). Here the respondent Insurance Company filed suit "to set aside" an award of $1,050 given Horton by the Texas Industrial Accident Board. The Court, instead of testing the jurisdictional amount by this sum, looks instead to allegations of the Insurance Company that Horton, the defendant in the action, "*will claim* the sum of $14,035 . . . ." This is the first time the Court has let a plaintiff affix jurisdiction by prophesying what the defendant would or might claim, rather than by stating what the plaintiff itself did claim. In so generously construing the statute, the Court confounds the test heretofore applied in diversity cases. It also nullifies the result of "years of study by the United States Judicial Conference and the Administrative Office of the United States Courts, as well as by the Congress," *ante*, p. —, in the adoption of the Act of July 25, 1958, 72 Stat. 415, increasing the jurisdictional amount in diversity cases to $10,000. Once again the United States District Courts in Texas will

be flooded by compensation cases,[1] and the Congress once again will be obliged to amend the diversity statute. Moreover, today's decision practically wipes out the long-existing distinction between declaratory judgment actions and conventional suits. See 28 U. S. C. § 2201. For these reasons I must dissent.

Petitioner, an injured workman, filed a claim under the Texas Workmen's Compensation Act before the Texas Industrial Accident Board for the maximum allowable recovery, $14,035 (401 weeks at $35 per week). The Board, after a hearing, awarded petitioner $1,050 ($35 per week for 30 weeks). Within hours of the award, respondent, the compensation insurer, literally raced into Federal District Court and filed suit to set aside the Board's decision. The diversity action was brought pursuant to Vernon's Tex. Ann. Civ. Stat., Art. 8307, § 5, which allows the issues to be determined "upon trial de novo, [where] . . . the burden or [*sic*] proof shall be upon the party claiming compensation." Upon petitioner's motion, the District Court dismissed the action for lack of jurisdiction. The Court of Appeals reversed.

The jurisdictional limits of Federal District Courts are bounded on one side by the Constitution and on the other by the enactments of Congress. Only that judicial power expressly granted by statute may be exercised by the *nisi prius* courts. *Lockerty* v. *Phillips*, 319 U. S. 182 (1943); *Kline* v. *Burke Construction Co.*, 260 U. S. 226 (1922); *Sheldon* v. *Sill*, 8 How. 441 (1850). In the light of such history, this Court has repeatedly held that such jurisdiction is to be narrowly interpreted. "The policy of the [diversity] statute calls for its strict construction." *Healy* v. *Ratta*, 292 U. S. 263, 270 (1934). See *Indianapolis* v. *Chase National Bank*, 314 U. S. 63 (1941); *St. Paul Indemnity Co.* v. *Red Cab Co.*, *supra*.

[1] In 1957, 2,147 workmen's compensation cases were commenced in the United States District Courts of Texas. S. Rep. No. 1830, 85th Cong., 2d Sess. 8.

The argument that the federal court, in diversity cases, is just another state court is inapposite here. As the Court points out, the determination of whether a case comes within the jurisdiction of a District Court "is a federal question to be decided under federal standards." *Ante*, p. —. The jurisdictional statute, "which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied." *Shamrock Oil Co.* v. *Sheets*, 313 U. S. 100, 104 (1941). Regardless of the method used by the Texas courts to determine the jurisdictional amounts for such cases, we must scrupulously apply the standard set by Congress for federal courts.

The statute conferring jurisdiction on District Courts in suits between parties of diverse citizenship limits it to those actions "where the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs . . . ." 28 U. S. C. § 1332 (a). In most cases, the determination of the amount in controversy is exceedingly simple, *e. g.*, liquidated damages. However, where the relief sought is difficult to define in terms of money, or is of differing value to the parties, the statute does not admit of ready application. To clarify these situations, this Court, in *St. Paul Indemnity Co.* v. *Red Cab Co.*, *supra*, at 288, stated: "[U]nless the law gives a different rule, *the sum claimed by the plaintiff controls* if the claim is apparently made in good faith." (Emphasis added.)

The application of the foregoing rules to the problem here results in a simple solution. At the time respondent filed its complaint, there was enforceable against it a liability in the amount of $1,050. If petitioner defaulted, the District Court would set aside the Board award. If respondent lost and petitioner filed no counterclaim, the judgment could only be for $1,050. It is only if petitioner counterclaims for an amount in excess of the jurisdictional amount of $10,000, that respondent may

controvert a claim cognizable in federal court. It seems impossible to avoid the conclusion that the Court is allowing diversity jurisdiction to be predicated upon a counterclaim which might possibly be filed by petitioner. "Even a "disclaimer or surrender of [a] . . . part of the original claim" would not change the Court's insistence upon looking to the alleged counterclaim if that were more than the respondent's claim, for the jurisdictional minimum. Apparently the Court would require a "denial of these allegations" that petitioner will claim an amount in excess of the jurisdictional limit before considering the respondent's prayer to set aside the Board's award as the source of the jurisdictional amount. *Ante*, p. —. Not only is this in patent conflict with *St. Paul Indemnity Co.* v. *Red Cab Co., supra*, but it distorts the meaning of Rule 3, Federal Rules of Civil Procedure, which states, "[a] civil action is commenced by filing a complaint with the court." Here the Court evidently holds that if the complaint, insufficient to meet the jurisdictional standards, alleges that a possible compulsory counterclaim, sufficient to meet such standards, may be filed by the defendant, federal jurisdiction attaches. Certainly we have never permitted a District Court to acquire jurisdiction under 28 U. S. C. § 1331 (a) [2] where the plaintiff does not allege a federal question but claims that the defendant will raise such an issue. "[W]hether a case is one [involving a federal question] . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, *unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.*" *Taylor* v. *Anderson*, 234 U. S. 74, 75–76 (1914).

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[2] "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

(Emphasis added.) See *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667 (1950); *First National Bank* v. *Williams*, 252 U. S. 504 (1920); *Louisville & N. R. Co.* v. *Mottley*, 211 U. S. 149 (1908). To allow such a procedure in diversity cases is to unbalance the entire jurisdictional pattern.

In essence, the Court has permitted respondent to turn its suit into an action for a declaratory judgment without meeting the requirements of the Declaratory Judgment Act. 28 U. S. C. § 2201. That Act provides that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, *upon the filing of an appropriate pleading, may declare* the rights and other legal relations of any interested party seeking such declaration . . . ." (Emphasis added.)

The complaint filed in the District Court was not styled a declaratory judgment action, and it did not seek such relief. More importantly, respondent has succeeded in avoiding the element of discretion permitted by the statute. See *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491 (1942). Declaratory relief is a procedural remedy and, therefore, the construction of the Act is a federal matter. See *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227 (1937). Whether or not such relief should be granted does not depend upon whether the state courts would exercise their discretion to grant a declaratory judgment in the same situation.[3] Differing factors are pertinent to the discretionary decisions of the two separate judicial systems.

[3] The argument that the suit here is not really one to set aside the Board award (because the moment it was filed that award was voided and the suit is, in reality, a new proceeding in which the workman must establish liability), when coupled with the result here, leads to the total abandonment of the rule of *St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283 (1938). It would permit jurisdiction to be established by the plaintiff's allegation that at some prior time the defendant had claimed, even if only extrajudicially, an amount equal to the jurisdictional minimum.

state and federal. In the latter system, discretionary refusal to entertain the action frequently occurs when the suit involves a state statute, such as the one here. See *Federation of Labor* v. *McAdory*, 325 U. S. 450 (1945). Moreover, it is even questionable whether respondent has satisfied the jurisdictional amount requirement for such actions. See *Travelers Ins. Co.* v. *Greenfield*, 154 F. 2d 950; *New York Life Ins. Co.* v. *Greenfield*, 154 F. 2d 953; *Commercial Casualty Ins. Co.* v. *Fowler*, 154 F. 2d 884; *Mutual Life Ins. Co.* v. *Moyle*, 116 F. 2d 434. That the Declaratory Judgment Act in no way affects the jurisdictional requirements for federal courts is clear. "To sanction suits for declaratory relief as within the jurisdiction of the District Courts merely because . . . artful pleading anticipates a defense based on federal law would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective functioning of the federal judicial system and distort the limited procedural purposes of the Declaratory Judgment Act." *Skelly Oil Co.* v. *Phillips Petroleum Co.*, *supra*, at 673–674.

Finally, today's decision effectively emasculates the recent congressional attempt to limit diversity jurisdiction, especially in workmen's compensation cases. In order to decrease "the workload of the Federal courts" which "has greatly increased because of the removal of workmen's compensation cases from the State courts to the Federal courts" the Judicial Conference of the United States urged the passage of the current legislation. S. Rep. No. 1830, 85th Cong., 2d Sess. 7. Workmen's compensation cases were singled out and specifically dealt with because they "arise and exist only by virtue of State laws. No Federal question is involved and no law of the United States is involved in these cases." *Id.*, at 8. To accomplish the desired result of restricting federal diversity jurisdiction, Congress raised the minimum jurisdic-

tional amount from $3,000 to $10,000. Corporations were deemed citizens of more than one state and removal of workmen's compensation cases to federal courts was forbidden.

To further limit the number of diversity cases, the Congress enacted 28 U. S. C. § 1332 (b), which provides that

> "where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, *computed without regard to any . . . counterclaim to which the defendant may be adjudged to be entitled,* . . . the district court . . . may impose costs on the plaintiff." (Emphasis added.)

This provision makes little sense when applied to the result now approved by the Court. If respondent were to obtain the relief it sought, namely, to have the Board's award of less than $10,000 "vacated, set aside, voided and declared to be of no further force and effect," it is clear that costs could be assessed against it under § 1332 (b). This produces an anomalous situation which the Court must implicitly approve. Respondent has no hope of avoiding possible liability under the cost sanction of § 1332 (b). This is so because the relief it obtains must be measured against the jurisdictional minimum "without regard" for Horton's possible counterclaim. We are therefore left with the strange result that while respondent has met the requirements of § 1332 (a), yet under § 1332 (b), it will be liable for costs for failing to meet the same requirements.

Moreover, the Senate Report expressed concern for the problems of the injured employee in federal court,

> "[S]ome of these State [workmen's compensation] statutes limit the venue to the place where the accident occurred or to the district of the workman's residence. When removed to the Federal court the

> venue provisions of the State statute cannot be applied. Very often cases removed to the Federal courts require the workman to travel long distances and to bring his witnesses at great expense. This places an undue burden upon the workman and very often the workman settles his claim because he cannot afford the luxury of a trial in Federal court." S. Rep. No. 1830, 85th Cong., 2d Sess. 9.

While 28 U. S. C. § 1332 does not specifically prohibit the filing of original workmen's compensation cases, a clearer expression of congressional dislike for saddling federal courts with such cases could hardly be imagined. We should, therefore, give effect to this policy wherever possible. Not only does the decision today fail to do this, but the Court goes out of its way to defeat the congressional intent. The statement that "the workman has the option to file his case in either the Federal or the State court," S. Rep. No. 1830, 85th Cong., 2d Sess. 9, is no longer correct. It is now an unequal race to the courthouse door—a race which the insurers will invariably win, since they have resident counsel in Austin (the location of the Texas Industrial Accident Board) who quickly secure news of Board awards and are thus enabled to "beat" the workman in the choice of forums. Thus, the Court—contrary to the specifically expressed intention of the Congress—grants the insurance companies the option of going into federal court, with all its attendant difficulties to the already over-burdened federal judiciary and the impecunious workman. We thought differently in 1957, when we refused to "read legislation with a jaundiced eye," saying that "it will not do for us to tell the Congress 'We see what you were driving at but you did not use choice words to describe your purpose.'" *United States* v. *Union Pacific R. Co.*, 353 U. S. 112, 118. Congress closed the back door and locked it tight in 1958, only to have the Court break down the front door today and hang out the welcome sign.